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In The

Supreme Court of the United States

ROGER D. BLACKWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Questions Presented By The First Reason For Granting The Petition

1. Whether a criminal defendant is deprived of his constitutional right to present a complete defense when a trial court precludes the admission of circumstantial evidence of his innocence based upon its weighing of the quantity and quality of other circumstantial evidence admitted at trial.

2. Whether a criminal defendant's constitutional rights to the presumption of innocence, and to have the government bear the burden of proving his guilt beyond a reasonable doubt, are denied when the admissibility of circumstantial evidence of his innocence is conditioned upon the trial court determining that an innocent inference is more probable than is a guilty one.

Questions Presented By The Second Reason For Granting The Petition

3. Where information outside the record is considered by a jury in a criminal case, whether it violates a defendant's Sixth Amendment rights to presume such error to be harmless, and to require the defendant to demonstrate a substantial and injurious influence on the jury.

4. Whether, instead of such presumption of harmlessness as held by the Sixth Circuit, there should be a rebuttable presumption of prejudice as all but one other circuit has held, where information outside the record is considered by a jury in a criminal case.

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PETITION FOR A WRIT OF CERTIORARI

Roger D. Blackwell ("Blackwell") respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (Pet. App. 1-57) is reported at 459 F.3d 739. The judgment of the United States District Court for the Southern District of Ohio (Pet. App. 58-65) is unreported. The order of the United States District Court for the Southern District of Ohio denying the motion for a new trial based on newly discovered evidence (Pet. App. 66-81) is unreported.

JURISDICTION

The United States District Court for the Southern District of Ohio had original jurisdiction pursuant to 18 U.S.C. § 3231, and entered its judgment on December 15, 2005. The Sixth Circuit Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291, and entered its judgment on August 29, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254. On November 17, 2006, upon Application No. 06A503, Justice Stevens extended Blackwell's time within which to file a petition for a writ of certiorari to December 27, 2006.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. Amend. V.

The Sixth Amendment of the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

The Fourteenth Amendment of the Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

This petition presents two important and recurring issues for this Court's consideration and resolution: (1) the treatment of circumstantial evidence giving rise to an inference of innocence, in the wake of this Court's holding in *Holmes v. South Carolina* concerning direct evidence giving rise to an inference of innocence; and (2) the multi-faceted split among twelve of the federal circuits concerning the continued vitality and the parameters of the rebuttable presumption of prejudice when extra-record information reaches the jury in a criminal case.

I. The Parties Involved

For nearly forty years, Petitioner Dr. Roger Blackwell was one of the most popular professors at The Ohio State University ("OSU"). (Pet. App. 2; *see also* R. 204, at 10.) He was a leading consumer behavior scholar and authored the first textbook in the field, now in its ninth edition. (R. 225, Tr. 3373-74.) He was also a renowned consultant and speaker. (*Id.* at 3386-87.) A philanthropist, Blackwell's gifts included a $7 million pledge to OSU's Fisher College of Business. (R. 204, at 45.) Tina Stephan ("Stephan") was Blackwell's wife. (Pet. App. 2.) Alfred and Gertrude Stephan are Stephan's parents (the "Stephan Parents"). (Pet. App. 2.) Sigrid McFetridge is Stephan's cousin. (R. 225, Tr. 414.) Jack Kahl was a friend of both Blackwell and Stephan. (Pet. App. 3.) Dale and Christian Blackwell are Blackwell's father and son, respectively. (Pet. App. 2.) Arnold Jack and Justin Voss are Blackwell's professional and personal friends. (Pet. App. 3.) Black Jack Enterprises was an Ohio general partnership in which Blackwell and Jack each owned an interest. (R. 1, at 3.) Kelley Hughes

was Blackwell's administrative assistant and chief scheduler. (R. 225, Tr. 3388-89.) Kevin Stacy is her husband. (Pet. App. 3.)

II. The Merger And The Stock Trading Involved

Between July 20, 1999 and October 1, 1999, Kellogg Company confidentially negotiated the acquisition of Worthington Foods ("WF") (the "Merger"), a small publicly-traded Ohio company. (Pet. App. 2.) During this period, Blackwell was a WF director. (*Id.*) Kahl, the Stephan Parents, McFetridge, Hughes, Stacy, Voss, Jack, Black Jack, and Dale and Christian Blackwell (the "Accused Traders") each bought WF stock (the "Accused Trading") between July 20, 1999, when the WF board first learned of Kellogg's interest, and October 1, 1999, when the Merger was publicly announced (the "Kellogg Window"). (R. 225, Tr. 5125-27.) Blackwell himself purchased no WF stock during the Kellogg Window, and received no profit from the Accused Trading. (R. 204, at 5.)

III. The Investigation, The Indictment, And The Trial

Following the Merger announcement, the National Association of Securities Dealers ("NASD") and the Securities & Exchange Commission ("SEC") began investigating increased buying activity in WF during the Kellogg Window. (Pet. App. 3-4.) This investigation eventually led to an indictment against Blackwell alleging one count of conspiracy to commit securities fraud ("insider trading"), one count of conspiracy to obstruct justice, twenty-one substantive counts of insider trading, one substantive count of obstruction of justice, and two counts of making false

statements. (Pet. App. 5.) The evidence against Blackwell at trial included both direct and circumstantial evidence. The direct evidence against him consisted entirely of the testimony of Stephan and Kahl, both of whom received immunity (and for Stephan, for her parents) in exchange for their testimony. (R. 190, at 2, 13-17, 19.) The government's principal circumstantial evidence against Blackwell was the fact that a circle of friends, business associates, and family around him – the Accused Traders – engaged in Accused Trading during the Kellogg Window. (*See*, *e.g.*, Pet. App. 21.) That circumstantial evidence is discussed in further detail below.

On June 20, 2005, Blackwell was convicted on nineteen counts, including conspiracy to commit insider trading, conspiracy to obstruct justice, obstruction of justice, two counts of making false statements, and fourteen counts of insider trading. (R. 171.) Blackwell was acquitted on seven substantive counts of insider trading and on one count of making a false statement. (*Id.*)

The district court denied a post-trial motion for acquittal or a new trial, and a later motion for a new trial based on newly discovered evidence. (Pet. App. 66-81 (order on second motion); R. 200 (order on first motion).) On December 15, 2005, Blackwell was sentenced to seventy-two months imprisonment and a $1 million fine. (Pet. App. 58-65.)

IV. The Post-Trial Discovery That The Jury Considered Matter Outside The Record In Its Deliberations

Six months after the verdict, *Columbus Monthly* magazine published an interview with one of the jurors in the case. (*See* Pet. App. 42.) In that article, the juror revealed the following, previously unknown information:

1. Three jurors believed they saw Blackwell mouth the words "I hate you" to Stephan while she was on the witness stand.
2. In their deliberations, those three jurors reported what they thought they had seen to the other nine jurors.
3. This alleged non-testimonial conduct – which is reflected nowhere in the record – was outcome-determinative. To use the juror's own words, it "virtually sealed" Blackwell's "fate."
4. The jury's reasoning was as follows:
   (a) Blackwell was asked (over objection) about the mouthing allegation on cross-examination.
   (b) He denied having mouthed "I hate you" to his ex-wife.
   (c) The jury contrasted Blackwell's denials against the non-testimonial conduct which three jurors believed they had observed, and which they shared in the jury room with their nine peers.
   (d) Based on the non-testimonial conduct "evidence" the three jurors presented to the other nine, all twelve jurors concluded Blackwell was not credible and convicted him.

(*See* Pet. App. 93-94; R. 207, Ex. A (the *Columbus Monthly* Article").)

The government first brought this alleged mouthing incident, which allegedly occurred at the start of a short recess, to the district court's attention in a sidebar discussion while Stephan was still on the witness stand on May 19, 2005. (Pet. App. 82-83; R. 225, Tr. 478:19-480:23.) The government did not question Stephan on the matter. (*See* R. 225, Tr. 342-437.) It offered no proof of the alleged mouthing incident. Significantly, the government declined the district court's invitation to immediately present evidence of the alleged incident. (Pet. App. 83; R. 225, Tr. 480.)

On June 7, 2005, more than two weeks later, the government sought to ask Blackwell about the alleged mouthing incident on cross-examination. (Pet. App. 87-90; *id.* at 3516:12-3519:16.) Anticipating the explosiveness of such cross-examination, the government convened a sidebar conference immediately in advance of its cross-examination on the topic. (Pet. App. 87-88; *id.* at 3516:12-3516:25.) The government identified two bases for asking the questions: that the alleged conduct constituted witness intimidation, and that such cross-examination would test Blackwell's credibility. (Pet. App. 87-88; *id.* at 3516:19-3516:25.) Over objection, the Court allowed the questioning. (Pet. App. 88-90; *id.* at 3517:1-3519:15.)

After a series of nine questions to Blackwell – in response to which he consistently denied having mouthed "I hate you" to his ex-wife – the government invited the jury to convict on non-record evidence with the following questions (objections to each of which were sustained):

Q. Now, are you aware that at least one person reported your activities to the Court?

* * *

Q. So if one juror saw you mouth the words "I hate you" to your wife during her direct exam, they will know you're lying today won't they?

(Pet. App. 89-92; *id.* at 3519:17-3521:17.)

Upon learning in early December, 2005 of the jurors' consideration of this non-record evidence (via the *Columbus Monthly* Article), Blackwell swiftly moved for a new trial (R. 207), which motion was denied (Pet. App. 66-81).

V. The Appeals Court Decision

On direct appeal to the Sixth Circuit, Blackwell argued, among other things, that he was deprived of a meaningful opportunity to present a complete defense, based on the exclusion of his rebuttal circumstantial evidence and the limitations on his cross-examination of the two immunized witnesses; and that he was entitled to a new trial, or in the alternative, a hearing pursuant to *Remmer v. United States*, 347 U.S. 227 (1954), based on the alleged mouthing incident. (*See* Pet. App. 8-9.)

The Sixth Circuit affirmed the trial court judgment on August 29, 2006. (Pet. App. 1-57.) As is explained more fully below, the Sixth Circuit held that Blackwell was not denied a meaningful opportunity to present a complete defense, reasoning that there was overwhelming evidence of guilt – namely the testimony of Kahl and Stephan and the circumstantial evidence of the number of people connected to Blackwell who had traded in WF stock. (*Id.* at 11-21.) The Sixth Circuit also assumed that the actions of the three jurors concerning the alleged mouthing

incident violated Blackwell's Sixth Amendment right of confrontation, but concluded that because such "juror misconduct" was not shown to have had "substantial and injurious effect or influence in determining the jury's verdict," the constitutional violation was harmless; and ignored the defense evidence "that the juror misconduct was not harmless" – *i.e.*, the *Columbus Monthly* Article – based on Evidence Rule 606(b) and its own conclusion that "the article actually suggests that the incident was not prejudicial." (*Id.* at 44-46.)

REASONS FOR GRANTING THE PETITION

This Court should issue a writ of certiorari in order to extend its recent decision in *Holmes v. South Carolina*, ___ U.S. ___, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), to cases where circumstantial evidence which is susceptible to competing inferences is offered, and hold that the right of a criminal defendant to a meaningful opportunity to present a complete defense is violated by a rule of evidence which excludes his circumstantial evidence giving rise to an inference of innocence absent a showing by the defendant that the inference to be drawn from his circumstantial evidence is stronger than the inference to be drawn from the government's circumstantial evidence.

This Court should also issue a writ of certiorari in order to resolve a significant conflict and confusion among the circuits concerning the continued vitality of the rebuttable presumption of prejudice in circumstances where extra-record information reaches the jury in a criminal proceeding. This issue has arisen in every federal circuit, other than the Federal Circuit, with one and perhaps two of the circuits having abandoned the presumption; four of

the circuits applying the presumption without reservation or qualification; and the other six circuits applying varying standards that span a continuum between these two extremes.

I. First Reason For Granting The Petition

A. The Government's Case Against Blackwell Included Circumstantial Evidence Of Purportedly "Suspicious" Trading By Those Around Him.

Within the last year, this Court decided *Holmes v. South Carolina*, holding that direct evidence of another's guilt, which gives rise to an inference that the defendant is innocent, cannot be excluded based on the quality or quantity of other direct evidence against the accused. This case presents the same question as was presented in *Holmes*, but in the context of circumstantial evidence of another's innocence which gives rise to an inference that the defendant is innocent. Because of the particular importance of circumstantial evidence in white-collar prosecutions such as this case, and because the constitutional principles involved should be applied in the same manner to all forms of evidence and inferences, this Court should use this case as an opportunity to extend *Holmes* to circumstantial evidence from which competing inferences can be drawn.

The case against Blackwell included both direct and circumstantial evidence. The most important aspect of the government's circumstantial case against Blackwell was the circle of friends, business associates, and family around him who traded in WF stock during the Kellogg Window – the Accused Traders. The government's emphasis on this circumstantial evidence began in its opening

statement, when it displayed a chart that placed Blackwell in the center, surrounded by the names of all ten of the Accused Traders. (R. 225, Tr. 220-22, 226.) What else, besides a Blackwell tip, the government argued, could explain why all ten purchased WF stock during the Kellogg Window? (*Id.* at 229-30.) The government thereby invited the inference, from this circumstantial evidence of trading around Blackwell, that he was guilty of the insider trading crimes charged.

Then, in its case in chief, the government, via NASD investigator Leslie Dawkins, explained how her agency first identified Blackwell as an investigative target. The agency looks for patterns of what she described as "suspicious" trading activity among the friends and family members of directors and officers of companies which have been the subject of a significant corporate event, such as a takeover:

> Once we get the information from the company about what was happening when and who was involved in the negotiations prior to the public announcement, when we get that information in, we're analyzing it and we're comparing it to the trading data that we received, and we're also analyzing that data.
>
> And we run a number of sorts on that data to try to determine who was trading the stock at that time and *whether or not their trading activity looked suspicious to us.*
>
> The sorts include, we'll take all the names of the people that were listed in the chronology as having knowledge of the negotiations prior to the public announcement, and we'll compare those last names to the names in the trading data to

> see if anyone with similar last names who might be either a direct insider or a relative of an insider is trading.
>
> And then we run numerous sorts on the trading data, as I said, to determine *whether or not it appears suspicious to us*.

(Tr. 1354 (emphasis added); *see also id.* at 1355 (identifying types of "suspicious" activity).) Four questions later, Ms. Dawkins identified Blackwell and the Accused Traders as being among those who had made the NASD's list of "suspicious" traders. (*Id.* at 1358-59 & Ex. 67.) She later testified that the NASD referred its findings of "suspicious trading activity" to the SEC. (*Id.* at 1365-66.) This aspect of the government's case against Blackwell was classic circumstantial evidence. The pattern of trading activity among those surrounding Blackwell was so unusual that it gave rise to an inference of guilt, so the government argument went.

Just as it had been featured in the government's opening and its case-in-chief, this same circumstantial evidence was featured in the government's closing argument:

> So who has a close relationship to Roger Blackwell or one of Roger Blackwell's close friends?
>
> Dale Blackwell, Christian Blackwell, Justin Voss, Arnold Jack, Kelley Hughes, Kevin Stacy, Black Jack Enterprises, the Stephans, the pension plan, Patrick Sullivan, Mary Hiser, Juanita Hiser.
>
> Remember, Mary Hiser said she and her mother bought; Sigrid McFetridge, the cousin of

> Kristina; Stuart Voss, the brother of Justin Voss; Robert George, the friend of Justin Voss; and Jack Kahl. All these 16 entities and people have a direct or immediate connection through – to Roger Blackwell, through himself directly or through one of his very close friends.

(*Id.* at 4801.)

B. Blackwell Was Barred From Offering Competing Circumstantial Evidence Giving Rise To A Competing Inference Of Innocence.

Blackwell offered competing circumstantial evidence. He engaged Dr. Gregory Jarrell, former chief economist of the SEC, as an expert witness to rebut the government's circumstantial evidence case against him. Dr. Jarrell explained that market activity inevitably shows increased volatility in the days and weeks before a merger announcement. (*Id.* at 2980.) However, such volatility is not necessarily indicative of insider trading. (*Id.* at 2981-82.) Information about an impending corporate transaction reaches the public in two ways – through illegal tipping, and through natural information leakage. (*Id.* at 2980-82.) Leakage occurs when people around directors overhear them on conference calls, schedule their appointments, observe the frequency of board meetings, their attitude and demeanor, and observe all kinds of related activity. (*Id.* at 2981, 3029-31.) People overhear parts of conversations, and conclude on their own that "something is up." (*Id.*) People lawfully trade on such "information." (*Id.* at 3032-33.) Dr. Jarrell developed this scholarship while at the SEC based on the agency's own data. (*Id.* at 2980.)

Information leakage would have offered the jury an innocent alternative explanation for the Accused Trading

(the "Innocent Alternative"). To rebut the impact of the government's chart placing Blackwell in the center of the circle of Accused Traders, the defense offered a rebuttal chart (the "Innocent Inference Chart"). (*Id.* at 3043-44; *see also* R. 190, App. A-2.) The Innocent Inference Chart and Dr. Jarrell's accompanying testimony would have shown peripheral trading around almost every WF director and officer with knowledge of the Merger discussions (the "WF Officials"), suggesting natural information leakage – the Innocent Alternative. (R. 225, Tr. 3041-45.) Importantly, in developing his proffered testimony and the Innocent Inference Chart, Dr. Jarrell analyzed the *exact same data* which Ms. Dawkins and the government investigators had considered in their investigation targeting Blackwell. (*See* R. 190, at 28.)

But while Dr. Jarrell was allowed to describe information leakage as a general theoretical concept, he was not allowed to apply it to the facts *of this case*. The excluded Jarrell testimony and the Innocent Inference Chart would have undermined the government's omnipresent inference that the Accused Trading could only be attributable to an illegal tip from Blackwell. Whereas the Accused Trading around Blackwell was portrayed by the government as bizarre, suspicious behavior, the jury would have seen it in a different light – as evidence of natural information leakage – had this Innocent Alternative been illustrated by the universality of peripheral trading around WF Officials.

From this landscape of peripheral trading surrounding all the WF Officials – which landscape was squarely put before the jury at every turn against Blackwell – two inferences were possible: that every WF Official engaged in illegal tipping; or that no one – including the defendant

WF Official, Roger Blackwell – engaged in illegal conduct, and that the circles of trading were instead evidence of leakage, the Innocent Alternative. Though here the defense was proffering this circumstantial evidence to illustrate the Innocent Alternative, the trial court excluded the evidence because of the government's argument that such evidence *could* be used to raise an improper inference that other WF Officials were guilty and should have been prosecuted instead of or together with Blackwell. (Pet. App. 85-87; R. 225, Tr. 3043:9-3045:17.) Showing that others may have committed a crime would not show Blackwell's innocence, the court reasoned. (Pet. App. 86; *id.* at 3044.) In so ruling, the trial court simply ignored Blackwell's rationale for offering the evidence – that the more reasonable inference to be drawn from the trading surrounding almost every WF Official was that the trading during the Kellogg Window was a consequence of natural information leakage, and that the *innocence* of his peers at WF could give rise to an inference that information leakage likewise explained the trading by the Accused Traders surrounding Blackwell (the "Innocence Inference").

The appeals court took a slightly different, but no less harmful, approach. Even though the government had invited the jury to draw an inference of guilt from the circumstantial evidence, based on the circle of Accused Traders surrounding Blackwell, evidence in support of Blackwell's *competing inference* – that of innocence, based on natural information leakage – was inadmissible *unless* in the court's own judgment the evidence showed that the defendant's Innocence Inference was a more probable inference to be drawn from the evidence than the government's guilt inference. (Pet. App. 12-13.) Interpreting

Evidence Rule 401, the appeals court reasoned that the Innocent Inference Chart (and accompanying testimony) could as easily show the purported guilt of the other WF Officials as it could show the innocence of those other WF Officials. (Pet. App. 12 ("Professor Jarrell planned to testify that the trading around other WF officials could have been caused by leakage. It is equally plausible, however, that the other directors tipped their relations.").) The court of appeals found the government's circumstantial evidence and Blackwell's circumstantial evidence to be of equivalent persuasiveness, with neither side's suggested inference being stronger than the other's, yet allowed the government's circumstantial evidence of peripheral trading around Blackwell and excluded Blackwell's circumstantial evidence of trading around other WF Officials as irrelevant. (Pet. App. 11-13.) Thus, instead of focusing on the probative value of the defendant's proffered evidence of innocence from the defendant's perspective, the Sixth Circuit focused instead on the probative value of defendant's evidence from the opposite perspective. Because (as viewed by the Sixth Circuit), Blackwell's circumstantial evidence was equally likely to give rise to *either* a guilty or an innocent inference, it was found to be inadmissible to support the defendant's Innocence Inference.[1] In so

[1] The appeals court specifically posited that it "might have reached a different conclusion regarding relevancy if Defendant was prepared to offer proof that the sheer existence of trading around all directors made leakage a more likely theory than insider trading." (Pet. App. 12.) Yet that is exactly what the government had done in its case – the sheer existence of a circle of trading activity surrounding Blackwell was admitted to support the inference that Blackwell surely must have tipped these people. Moreover, and ironically, the court of appeals held that the excluded circumstantial evidence concerning the Innocent Alternative "would not have created a reasonable doubt as to Defendant's guilt" because of "the sheer number of family and friends of

(Continued on following page)

holding, the court read the word "any" out of Evidence Rule 401, which defines relevant evidence as that "having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added.) The Sixth Circuit now defines relevant evidence as only that having a greater than 50% likelihood of making a fact more or less probable.

C. The Sixth Circuit's Holding Deprived Blackwell Of A Meaningful Opportunity To Present A Complete Defense.

The rule adopted by the Sixth Circuit has three fundamental problems.

First, it relieves the prosecution of its constitutionally imposed burden of proving guilt beyond a reasonable doubt by making the admissibility of the defendant's evidence giving rise to the Innocence Inference dependent on his persuading the court that his proposed inference is a more likely one to be drawn from the evidence than the competing inference propounded by the government.

Second, before ruling on the admissibility of evidence giving rise to a competing inference, the judge becomes a trier of fact, determining the relative weight of the competing inferences which could be drawn from the defendant's evidence.

Defendant who bought WF stock in the relevant time period" – precisely the evidence that the Jarrell testimony and the Innocent Inference Chart were offered to rebut. (Pet. App. 13.)

Third, the evidence supporting the Innocence Inference was excluded simply because it also, in the court's mind, was susceptible to a competing, equally likely inference – that others are guilty and ought to have been prosecuted – despite the fact that *neither* the prosecution nor the defense urged that inference.

Here, both of the courts below engaged in precisely the sort of evidence- and inference-balancing which this Court unanimously held, in *Holmes v. South Carolina*, ___ U.S. ___, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), to be unconstitutional in deciding questions of admissibility of direct evidence. In *Holmes*, this Court held that the admissibility of a defendant's exculpatory direct evidence must not depend on the competing inferences of guilt that can be drawn from the other evidence in the record, and squarely and unanimously rejected the proposition that the admissibility of defense evidence depends on its relationship to other, contrary evidence. *Id.* at 1734-35, 164 L. Ed. 2d at 511-13. The South Carolina Supreme Court had held that "'where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt' may (or perhaps must) be excluded." *Id.* at 1734, 164 L. Ed. 2d at 511. Where there is enough smoke there surely must be fire, and so a defendant may not point to another source of the fire, according to the state court.

In this case, when the Innocent Inference Chart and related Jarrell testimony were excluded, the government had already presented the smoke – the circle of Accused Trading around Blackwell – and invited the jury to infer that there must be fire. Blackwell's defense to the government's

circumstantial case against him was not that there was another arsonist responsible for the fire – the exact *Holmes* scenario – but that the fire was of natural origin. That is, the other circles of trading around the other WF Officials were the result of the natural information leakage that surrounds corporate insiders, and tended to show the *innocence* of all WF Officials, giving rise to an inference (a) that information leakage happens, (b) that it happened in this case, and (c) that there was a credible Innocent Alternative to explain the government's circumstantial case against Blackwell. Had the evidence been allowed, the jury could have inferred that the purportedly "suspicious" trading surrounding Blackwell – the lion's share of the government's circumstantial case against him – was likewise explainable by a naturally occurring phenomenon, not by criminal conduct.

D. *Holmes v. South Carolina* Should Be Extended.

Holmes holds that direct evidence of another's guilt giving rise to an inference of innocence on the part of the defendant cannot be excluded based on the quality or quantity of other direct evidence against the accused. This Court should accept jurisdiction of this case to extend *Holmes* in one of two respects. First, it should extend *Holmes* to apply in the same manner to *circumstantial* evidence, and more particularly, to circumstantial evidence of another's *innocence* giving rise to an inference of innocence on the part of the defendant. Alternatively, or additionally, this Court should extend *Holmes* to apply to competing inferences, such that evidence giving rise to an inference of innocence is not excluded based on the proposition that there exists an equally likely competing

inference that could be drawn from the same evidence. To illustrate the point of this latter proposed holding, consider the following statement in *Holmes*: "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.*, 126 S. Ct. at 1735, 164 L. Ed. 2d at 513. Change the word "evidence" to "inference" and we have this case: "[B]y evaluating the strength of only one party's inference [the government's], no logical conclusion can be reached regarding the strength of a contrary inference offered by the other side [Blackwell] to rebut or cast doubt." A writ of certiorari should issue in this case so that the important constitutional principle at issue in *Holmes* can be extended to all forms of evidence, and to evidence which is susceptible to competing inferences.

II. Second Reason For Granting The Petition

A. This Court's Jurisprudence

Under *Remmer v. United States*, 347 U.S. 227 (1954), prejudice to a defendant is presumed when it is brought to the court's attention that extraneous information may have reached the jury at trial, and it is the duty of the prosecutor to rebut the presumed prejudice. *Id.* at 229 ("In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . . The presumption is not conclusive, but the *burden rests heavily upon the Government* to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.") (emphasis added).

This Court discussed the *Remmer* presumption of prejudice next in *Smith v. Phillips*, 455 U.S. 209 (1982). *Phillips* was not a Sixth Amendment case where extra-record information reached the jury. Rather, a juror failed to disclose that he had applied for a position with the prosecutor's office mid-trial. *Id.* at 213. This Court suggested that a defendant alleging juror misconduct, in violation of the defendant's due process rights, must prove actual bias. *Id.* at 215-16 (citing *Remmer*, 347 U.S. at 229-30). Some courts and commentators have suggested that *Phillips* thereby circumscribed or eliminated the presumption of prejudice first articulated in *Remmer*. *See* discussion *infra*.

Finally, the Court revisited *Remmer* again in *United States v. Olano*, 507 U.S. 725 (1993). Like *Phillips*, *Olano* was not a Sixth Amendment case where extra-record information reached the jury; it was instead a case where alternate jurors were allowed into the jury room. *Id.* at 727-29. Applying a plain error standard, this Court declined to presume prejudice, and did not decide whether a presumption of prejudice exists, suggesting that certain intrusions into the jury's deliberative process may give rise to a presumption of prejudice in certain cases, *id.* at 738-39, but reasoning that "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *Id.* at 739.

B. The Circumstances Of This Case And The Rule In The Sixth Circuit

As explained above, the Sixth Circuit in this case assumed that the mouthing incident in fact happened, and

that the actions of the three jurors concerning the alleged mouthing incident "violated [Blackwell's] Sixth Amendment right to confront witnesses against him." (Pet. App. 45.) Instead of applying a rebuttable presumption of prejudice where extra-record information reaches the jury, as this Court's precedent commands, and as every other circuit does to some degree, the Sixth Circuit instead held that "Confrontation Clause violations are subject to harmless error analysis and do not constitute reversible error unless they 'had substantial and injurious effect or influence in determining the jury's verdict.'" (*Id.*)

In effect, the court imposed a presumption of harmlessness upon Blackwell. Indeed, his burden to overcome that presumption against him was extraordinary. Although he was excused from proving as a matter of fact that the jurors violated his Sixth Amendment right of confrontation, he was compelled to prove that their violation of that constitutional right made a critical and perhaps dispositive difference in the case. But he could muster no evidence with which to meet that burden, because Evidence Rule 606(b) bars juror testimony concerning their deliberations. Thus, although the district court assumed the event happened despite an evidentiary vacuum on the point, although the appeals court assumed that the incident compromised Blackwell's Sixth Amendment rights, although the government by its carefully planned, objectionable questions induced the constitutional violation, and although a juror said that the event was conviction-dispositive, the Sixth Circuit presumed harmlessness and shouldered Blackwell with a profoundly challenging burden, and deprived him of any tools with which to rebut the presumption of harmlessness.

This presumption of harmlessness is unique to the Sixth Circuit. Unlike its sibling circuits, the Sixth Circuit has concluded that the rebuttable presumption of prejudice no longer applies in circumstances where extra-record information reaches the jury. *United States v. Branham*, 97 F.3d 835, 855 (6th Cir. 1984) ("The burden rests on the defendants to demonstrate that the alleged juror misconduct prejudiced their defense, and under no circumstance will prejudice be presumed."); *accord United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984) ("In light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed.").

C. The Other Eleven Circuits Are Split.

The Sixth Circuit stands alone in holding that a presumption of prejudice never arises where extra-record information reaches and is considered by the jury. Each of the eleven other circuits has reached the question, although their opinions vary on the applicability of the presumption of prejudice and the circumstances when it should and should not be applied.

At one end of the spectrum stand the Second, Seventh, Tenth, and Eleventh Circuits, which apply, without reservation or qualification, a rebuttable presumption of prejudice in cases involving evidence of extraneous information reaching the jury. *Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir.), *cert. denied*, 513 U.S. 901 (1994) ("[E]xtra-record information that becomes known to the jury is 'presumptively prejudicial.' This presumption, however, may be overcome by a showing that the extra-record information

was harmless." (citations omitted)); *Schaff v. Snyder*, 190 F.3d 513, 533-34 (7th Cir. 1999); *United States v. Scull*, 321 F.3d 1270, 1280 (10th Cir.), *cert. denied*, 540 U.S. 864 (2003) ("When members of a jury are exposed to extraneous information about a matter pending before the jury, a presumption of prejudice arises."); *United States v. Martinez*, 14 F.3d 543, 550 (11th Cir. 1994) ("As a matter of established law, the burden of proving prejudice does not lie with the defendant because prejudice is presumed the moment the defendant establishes that 'extrinsic contact with the jury in fact occurred.'" (quoting *United States v. Caporale*, 806 F.2d 1487, 1503 (11th Cir. 1986))); *id.* ("Once the defendant proves extrinsic contact, the burden shifts to the government to demonstrate that the consideration of the evidence was harmless."); *accord United States v. Pessefall*, 27 F.3d 511, 515 (11th Cir. 1994), *cert. denied*, 513 U.S. 1174 (1995) ("Once a defendant establishes that the jury had an extrinsic contact, the burden shifts to the government to demonstrate that the consideration of the extrinsic evidence was harmless."). *But see United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1990) ("When jurors consider extrinsic evidence, . . . [p]rejudice is not presumed. The defendant has the burden of demonstrating prejudice by a preponderance of credible evidence.").

At the opposite end of the spectrum is the Fifth Circuit, which has arguably joined the Sixth Circuit in eschewing the rebuttable presumption of prejudice, observing that the "*Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*," and that the "trial court must first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the government be required to prove its absence." *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998).

In between these two extremes lie the remaining six circuits, each of which follows its own path, and whose respective holdings on when the presumption applies span a continuum from "more than innocuous" to "an egregious tampering or third party communication which directly injects itself into the jury process."

The Fourth Circuit is arguably closest to the Second, Seventh, Tenth, and Eleventh Circuits. It applies the rebuttable *Remmer* presumption of prejudice once the party attacking the verdict shows that the extrajudicial communications or contacts were "more than innocuous interventions." *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996) (quoting *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986)). Indeed, once this "minimal standard" is met by the defendant, the presumption of prejudice is "triggered automatically." *Id.*

The Eighth Circuit, meanwhile, requires that the extrinsic contact relate to "'factual evidence not developed at trial'" before it will apply the rebuttable *Remmer* presumption of prejudice. *United States v. Wallingford*, 82 F.3d 278, 281 (8th Cir. 1996) (quoting *United States v. Blumeyer*, 62 F.3d 1013, 1016 (8th Cir. 1995)).

The Ninth Circuit applies a *Remmer* presumption of prejudice where the extraneous contact "'raises a risk of influencing the verdict'" or "'had an adverse effect on the deliberations.'" *United States v. Rutherford*, 371 F.3d 634, 644 (9th Cir. 2004) (quoting *Caliendo v. Warden of Calif. Men's Colony*, 365 F.3d 691, 697 (9th Cir.), *cert. denied*, 543 U.S. 927 (2004), and *United States v. Henley*, 238 F.3d 1111, 1115 (9th Cir. 2001)); *see also Caliendo*, 365 F.3d at 696 ("[I]f an unauthorized communication with a juror is *de minimis*, the defendant must show that the

communication could have influenced the verdict before the burden of proof shifts to the prosecution."); *see also id.* at 697 (rejecting argument that in order for the presumption of prejudice to attach, "the substance of the extrinsic contact must factually relate to the trial").

The Third Circuit applies the presumption of prejudice only "when the extraneous information is of a considerably serious nature" as determined ad hoc by the court. *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001).

The District of Columbia Circuit has questioned the appropriate breadth of *Remmer* after *Phillips* and *Olano*, and observed that the Circuit no longer treats the presumption as "particularly forceful." *United States v. Williams-Davis*, 90 F.3d 490, 496 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1128 (1997) ("Although often referring to *Remmer*, this court has in fact not treated the supposed 'presumption' as particularly forceful, but rather has accepted the necessity of focusing on the specific facts of the alleged contact . . . ."); *see also id.* at 501 (in dicta, noting: "We reach this conclusion quite independently of our earlier conclusion that the presumption of prejudice stated in *Remmer*'s initial formulation has eroded; we think *Remmer* never applied at all outside the area of private contacts with jurors.").

The First Circuit has arguably come the closest to abandoning the presumption of prejudice without actually doing so. The court observed that since *Smith v. Phillips*, the law "does not strictly mandate the use of a rebuttable presumption in every case," and that the *Remmer* "presumption [of prejudice] is applicable only where there is an egregious tampering or third party communication which directly injects itself into the jury process." *United*

States v. Boylan, 898 F.2d 230, 261 (1st Cir.), *cert. denied*, 498 U.S. 849 (1990). The First Circuit has more recently observed that "one court [the Fifth Circuit] has concluded that *Remmer* is a dead letter," but stopped short of doing so itself, "[a]lthough we too have questioned *Remmer*'s continued vitality." *United States v. Bradshaw*, 281 F.3d 278, 288 (1st Cir.), *cert. denied*, 537 U.S. 1049 (2002).[2]

Like the courts themselves, commentators have noted the circuit split on the presumption of prejudice. *See, e.g.*, Bradley Tennyson Smith, Note, *Remmer's Presumption of Prejudice: The Tenth Circuit's Position*, 81 Denv. U. L. Rev. 687, 687-88 (2004) ("Whether the *Remmer* presumption applies, and in what form, is a question with serious implications, and the split in the circuits undoubtedly means the outcomes in like cases will vary depending upon the circuit in which they arise."); Recent Comment, *Criminal Procedure – Jury Tampering – Ninth Circuit Holds That Glaring by Government Agents May Trigger*

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[2] The burden imposed upon Blackwell in this case – to show "substantial and injurious effect or influence in determining the jury's verdict" – bears no resemblance to that which is imposed on the government. In the Fourth Circuit, once the rebuttable presumption of prejudice is triggered, "[t]he burden then shifts to the prevailing party [*i.e.*, the government] to prove that there exists no 'reasonable possibility that the jury's verdict was influenced by an improper communication.'" *Cheek*, 94 F.3d at 141 (quoting *Stephens v. South Atl. Canners, Inc.*, 848 F.2d 484, 488-89 (4th Cir. 1988)). The rule in the Fifth Circuit is similar: "Further, it is well-settled that 'a defendant is entitled to a new trial when extrinsic evidence is introduced into the jury room "unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it."'" *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir.), *cert. denied*, 516 U.S. 979 (1995) (quoting *United States v. Luffred*, 911 F.2d 1011, 1014 (5th Cir. 1990), and *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir. 1980)); *accord Rutherford*, 371 F.3d at 644.

Presumption of Prejudice – United States v. Rutherford, *371 F.3d 634 (9th Cir. 2004)*, 118 Harv. L. Rev. 2445, 2449 (May 2005) (noting that the Ninth Circuit applied a presumption of prejudice after a credible showing of jury tampering, but that the rule of law would have been different in "three circuits – the Fifth, Sixth, and the District of Columbia – [as those circuits] have explicitly abandoned or constricted the *Remmer* presumption [of prejudice] in light of *Phillips*, *Olano*, or both"). Several circuit courts have likewise noted this split. For example, while some courts have gone so far as to describe *Remmer* and its presumption of prejudice as a "dead letter," the Third Circuit has expressly rejected that prospect: "The district court correctly concluded that the Supreme Court in *Smith v. Phillips* did not reject *Remmer*'s presumption of prejudice." *United States v. Console*, 13 F.3d 641, 666 (3d Cir. 1993), *cert. denied*, 511 U.S. 1076 (1994). The Tenth Circuit has also noted the apparent split in the circuits, but has declined to abandon, narrow, or replace the presumption of prejudice. *Scull*, 321 F.3d at 1280 n.5 (noting that while other circuits have questioned the survival of the *Remmer* presumption, "[i]n the absence of Supreme Court authority to the contrary, . . . we review [the defendant's] claim under *Remmer*'s rubric"); *accord Tunstall v. Hopkins*, 306 F.3d 601, 611 (8th Cir. 2002), *cert. denied*, 538 U.S. 968 (2003) (noting that "the federal circuits disagree on the application of *Remmer* regarding any presumption of prejudice").

D. The Presumption Of Prejudice Exists Because Of Evidence Rule 606(b).

Although *Remmer*, which introduced the rebuttable presumption of prejudice, was decided before the enactment

of Evidence Rule 606(b), several courts have observed that Evidence Rule 606(b) is the animating force behind the presumption. *See United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982) ("Because Rule 606(b) precludes the district court from investigating the subjective effects of any extrinsic material on the jurors, whether such effects might be shown to affirm or negate the conclusion of actual prejudice, a presumption of prejudice is created and the burden is on the government to prove harmlessness."); *Cheek*, 94 F.3d at 144 ("Rule 606(b) at times makes it more difficult to determine whether a new trial is warranted. But sound policy supports the rule and outweighs any inconvenience or difficulty the rule imposes." (citations omitted)).

Among those circuit courts which have retreated from or – as the Sixth and perhaps the Fifth Circuits have done – abandoned the presumption of prejudice, none has reconciled the constitutional conundrum which is squarely presented by this case. That is, how shall a criminal defendant prove that which the law prevents him from proving? This case starkly illustrates the harm visited upon a defendant who does not enjoy a presumption of prejudice. The government was allowed to pursue a line of questioning on a matter it had led everyone concerned to believe it had abandoned. The government was allowed to suggest to the jurors that Blackwell had engaged in threatening conduct without presenting any evidence of that alleged conduct to the court. And three of the jurors heeded the government's suggestion, reporting to the others extra-record "evidence" which, in their own words, they found conviction-determinative. Yet no hearing was ever held – to investigate the alleged mouthing incident when it happened, or the jurors' conduct when it was discovered – and none of these witnesses against Blackwell was

ever exposed to cross-examination. It is precisely because Evidence Rule 606(b) is so vital to the public's faith in the justice system that this Court should resolve the conflict among the circuits and affirm that the rebuttable presumption of prejudice is alive and well where extraneous information reaches the jury.

CONCLUSION

The petition of Roger D. Blackwell for a writ of certiorari should be granted.

Respectfully submitted,

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December 26, 2006

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROGER D. BLACKWELL, Defendant-Appellant.

No. 05-4588.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0326p.06;

459 F.3d 739; 2006 U.S. App. LEXIS 22078; 2006 FED App. 0326P (6th Cir.)

July 25, 2006, Argued
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COUNSEL: ARGUED: William C. Wilkinson, THOMPSON HINE, Columbus, Ohio, for Appellant.

J. Michael Marous, ASSISTANT UNITED STATES ATTORNEY, Columbus, Ohio, for Appellee.

ON BRIEF: William C. Wilkinson, Scott A. Campbell, O. Judson Scheaf, III, Michele L. Noble, THOMPSON HINE, Columbus, Ohio, for Appellant.

J. Michael Marous, ASSISTANT UNITED STATES ATTORNEY, Columbus, Ohio, for Appellee.

JUDGES: Before: MOORE, CLAY, and GRIFFIN, Circuit Judges.

OPINION BY:

CLAY, Circuit Judge. Defendant, Roger D. Blackwell, appeals a December 15, 2005 final judgment of the United States District Court for the Southern District of Ohio, convicting Defendant of one count of conspiracy to commit insider trading in violation of 18 U.S.C. § 371, one count of conspiracy to obstruct an agency proceeding in violation of 18 U.S.C. § 371, fourteen counts of insider trading in

violation of 15 U.S.C. §§ 78j and 78ff, one count of obstructing an agency proceeding in violation of 18 U.S.C. § 1505, and two counts of making false statements in a federal matter in violation of 18 U.S.C. § 1001; sentencing Defendant to seventy-two months imprisonment; and fining Defendant $ 1,000,000. For the reasons set forth below, we **AFFIRM** Defendant's convictions and sentence.

I.

BACKGROUND

Defendant is a former professor at Ohio State University's School of Business, as well as the president of Roger Blackwell and Associates ("RBA") and an investor in Black Jack Enterprises. Between 1991 and 2004 he was married to Kristina Stephan-Blackwell ("Stephan-Blackwell"). The events in this case arise out of the conduct of Defendant and Stephan-Blackwell in 1999, while Defendant was a member of the board of directors of a small natural foods company, Worthington Foods ("WF"). In July 1999, Kellogg Company ("Kellogg") initiated negotiations for a buyout of WF. The buyout occurred in October 1999. Between July and October 1999, however, several of Defendant's friends and family members invested in WF stock. The following is a list of persons linked to the Blackwells, who bought stock between July and October 1999:

- Gertrude and Alfred Stephan ("the Stephans"), the parents of Stephan-Blackwell;
- Dale and Christian Blackwell, the father and son of Defendant, respectively;
- Kelley L. Hughes ("Hughes"), RBA's director of marketing;

- Kevin L. Stacey ("Stacey"), the husband of Hughes;
- Arnold L. Jack ("Jack"), a long-time friend of Defendant and co-owner of Black Jack Enterprises;
- Justin Voss ("Voss"), a long-time friend and business associate of Defendant; and
- Jack Kahl ("Kahl"), a long-time friend and business associate of Defendant.

The increased buying activity in WF stock between July and October 1999 led to an investigation. On December 15, 1999, the National Association of Securities Dealers ("NASD") sent Kellogg a questionnaire on the Kellogg-WF buyout, requesting information on relationships between persons who bought stock between July and October 1999 and persons who knew about the buyout. Pursuant to the NASD inquiry, Kellogg forwarded the list of persons who bought stock to Defendant, and requested that he inform them of any relationships he had with such persons. Defendant responded to the inquiry by stating: "I supplied no information about the transaction to any of the people on the list or any one else. When asked by anyone about Worthington Foods during this period, I replied that I was not able to comment about the company's stock, as is my standard practice." (J.A. at 4882.)

On March 16, 2000, the NASD sent a follow-up questionnaire to Kellogg. The follow-up, among other things, explicitly requested that Defendant supply information on his relationships to the Blackwells, Jack, Black Jack Enterprises, Hughes, Stacey and a statement as any circumstances under which they might have learned of the buyout. Defendant responded, explaining his relationships to them, but denying that he informed them of the buyout.

Defendant stated, and still maintains, that he promoted WF because he believed in its value, but never disclosed the buyout.

On November 2, 2000, the Securities and Exchange Commission ("SEC") issued a subpoena, requiring Defendant to produce various documents and appear to testify before the SEC. Defendant eventually testified before the SEC on January 9, 2001, claiming that he did not disclose any information about the Kellogg-WF buyout to any person. In January 2002, the SEC sent a written inquiry to Defendant. Defendant responded on January 18, 2002, reiterating his position that he never disclosed any information about the Kellogg-WF buyout. In February 2002, Stephan-Blackwell and her parents testified before SEC. They denied that Blackwell had given them insider information on the buyout.

In early 2003, Defendant and Stephan-Blackwell began to have marital difficulties. They separated and Stephan-Blackwell moved to New York, where she began dating Terry Lundgren. In the spring of 2004, Stephan-Blackwell's attorney contacted the government about the instant case. Sometime thereafter Stephan-Blackwell learned that the government was considering pressing charges against her for perjury and insider trading. In the summer of 2004, Stephan-Blackwell and the government worked out an immunity deal, in which Stephan-Blackwell and her parents would receive immunity in exchange for Stephan-Blackwell's admission to conspiracy, perjury, and insider trading and testimony against Defendant. Stephan-Blackwell and Defendant finalized their divorce at approximately the same time. Several months later, Stephan-Blackwell and Lundgren became engaged.

In this same time period, Kahl also approached the government about his involvement in the instant case. On May 27, 2004, pursuant to a proffer of immunity, Kahl admitted to the FBI that Defendant tipped him on the Kellogg-WF buyout. Subsequently, Kahl testified before the grand jury. Specifically, Kahl testified that he spoke with Defendant around 12:30 p.m. on his (Kahl's) birthday, September 20, 1999, and that Defendant informed him that Kellogg was going to buy out WF and that Kahl should buy WF stock.

On August 26, 2004, a grand jury indicted Defendant, Hughes, Stacey, Jack, Voss, and Black Jack Enterprises on charges of insider trading in violation of 15 U.S.C. §§ 78j and 78ff, conspiracy to commit insider in violation of 18 U.S.C. § 371, obstruction of agency proceedings in violation of 18 U.S.C. § 1505, conspiracy to obstruct agency proceedings in violation of 18 U.S.C. § 371, and making false statements in violation of 18 U.S.C. § 1001.

At trial Stephan-Blackwell, Mary Hiser, Jack Kahl, Dwight Twomley, and Michelle Destefano testified for the government. Stephan-Blackwell testified that she informed her parents, the Stephans, and her cousin, Sigrid McFetridge, of the buyout and encouraged them to buy WF stock after discussing the propriety of doing so with Defendant. She further testified that she and Defendant gave her parents money to buy WF stock. Stephan-Blackwell also testified that both she and Blackwell lied to the NASD and SEC about the tipping, and that she coached her mother to lie to the SEC. She further testified that she deleted emails to Jack Kahl, Sigrid McFetridge, Gertrude Stephan, and Justin Voss on November 8, 2002, after receiving a SEC subpoena, in order to protect herself and Defendant. According to

Stephan-Blackwell, Defendant was aware of the deletions and condoned them. Additionally, she and Blackwell formulated a plan to withhold information and obscure their relationships with parties who bought WF stock.

Significantly, during Stephan-Blackwell's trial testimony, Defendant allegedly mouthed "I hate you" to Stephan-Blackwell. Finding that such conduct would constitute witness intimidation, the district court allowed Defendant to be cross-examined on this issue, during which Defendant denied mouthing anything to Stephan-Blackwell.

Mary Hiser, Defendant's assistant at RBA, testified that she was responsible for opening mail and emails at RBA and that no mail or emails had been sent to RBA about the buyout. Hiser further testified that on November 10, 2000 she noticed that four entries had recently been deleted on November 8, 2000 from RBA's database: (1) Sigrid McFetridge; (2) John Kahl;[1] (3) Alfred Stephan; and (4) Justin Voss. Hiser printed a copy of the record of deletion because she knew that RBA's files had been subpoenaed. The record was entered into evidence.

Jack Kahl testified that Defendant Blackwell informed him of the buyout, and that he bought WF stock on the morning of his birthday, September 20, 1999, based on the tip. Kahl could not remember the exact date that Defendant tipped him but believed it was around his birthday.

Twomley, WF's CEO and chairman of the board in 1999, testified regarding WF, the buyout, and Defendant's knowledge of it as a board member. Twomley further

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[1] There is some debate over to whom John Kahl refers. Jack Kahl's full name is John, but John is also his son's name.

testified that there were rumors, mainly among WF employees, in the summer of 1999 that a bigger company would buy out WF.

Michelle DeStefano, an FBI agent involved in investigating the defendants, testified that subpoenaed phone records evidenced numerous phone calls between the defendants between July and October 1999.

Thereafter, defendants Jack, Voss, Hughes, Stacey, and Blackwell, as well as non-defendants, Dale Blackwell (Defendant's father), Professor Jarrell, and John Adams testified for the defense. All the defendants denied wrongdoing. Specifically, they all denied that Defendant Blackwell informed them of the buyout. Jack, an attorney, and Voss, who has a Ph.D. in economics and formerly was a professor at George Washington University, additionally testified that they had extensive stock market experience and bought WF stock because it appeared to be a good deal.

Professor Jarrell, former chief economist for the SEC, testified that WF stock was undervalued in September 1999, and thus that it was a good buy. He further testified that sophisticated investors would recognize that WF was undervalued and a potential target for a buyout. Professor Jarrell also explained "leakage theory." According to Professor Jarrell, information on mergers and buyouts will often "leak" to the public without insider trading. Companies about to buy out or be bought out give off signals indicating that a future buyout will occur. Sophisticated investors, especially analysts, and research companies looking for these signals, often learn of buyouts before they are publically announced. Similarly, family members and close friends may notice an insider's increased activity

levels and presume that a merger, or some other large transaction, is about to occur. Finally, Adams testified that he saw rumors of the buyout on Yahoo.

Based on the testimony described above, a jury convicted Defendant of insider trading, conspiracy to commit insider trading, conspiracy to obstruct an agency proceeding, and obstruction of an agency proceeding. A juror's interview in a Columbus magazine, published several months after trial, states that three jurors believed they saw Defendant mouth "I hate you" to Stephan-Blackwell and that Defendant's denial of such actions destroyed his credibility. Defendant moved for a new trial based on the "lip reading incident," which the district court denied.

II.

DISCUSSION

Defendant challenges his conviction on the following grounds: (1) the trial court denied him a meaningful opportunity to present a defense by excluding evidence and limiting cross-examination; (2) the government withheld exculpatory, material evidence in violation of *Brady v. Maryland;* (3) insufficient evidence exists to support his convictions for conspiracy, false statements, and obstruction of an agency proceeding; (4) the conspiracy indictment materially varied from the evidence at trial, allowing the introduction of prejudicial evidence and depriving him of the opportunity to prepare an adequate defense; (5) the trial court's jury instructions were improper; (6) three jurors violated Defendant's right to confront witnesses by "testifying" that Defendant mouthed "I hate you" to Stephan-Blackwell during jury

deliberations; and (7) cumulative errors rendered Defendant's trial fundamentally unfair in violation of due process.

Defendant challenges his sentence on the following grounds: (1) the $1,000,000 fine was excessive; (2) the condition on Defendant's supervised release, prohibiting him from profiting from writing about his crimes, violates the First Amendment; (3) the district court improperly enhanced his sentence by miscalculating "loss amounts" attributable to Defendant's conduct; and (4) the district court failed to consider all of the relevant § 3553 factors.

We find that all of Defendant's claims on appeal are wholly without merit. Each issue is discussed separately below.

A. Meaningful Defense

Defendant argues that he was denied the right to present a meaningful defense in violation of the Fifth and Sixth Amendments of the United States Constitution when the district court excluded testimony from defense witnesses Professor Jarrell, Jehn, Adams, and Cusato, and when the district court limited his cross-examination of prosecution witnesses Stephan-Blackwell and Kahl. For the reasons set forth below, we find that Defendant was not denied the right to present a meaningful defense.

1. Standard of Review

The parties in this case dispute the standard of review. Defendant argues that this Court applies *de novo* review to constitutional challenges to evidentiary decisions whereas the government argues that this Court applies

the abuse of discretion standard of review to all evidentiary decisions. While the government is correct that we review all challenges to district court evidentiary rulings, including constitutional challenges, under the abuse of discretion standard, *see United States v. Schreane,* 331 F.3d 548, 564 (6th Cir. 2003); *United States v. Mick,* 263 F.3d 553, 566 (2001); *United States v. Middleton,* 246 F.3d 825, 837 (6th Cir. 2001), the abuse of discretion standard is not at odds with *de novo* interpretation of the Constitution inasmuch as district court does not have the discretion to rest its evidentiary decisions on incorrect interpretations of the Constitution, *see United States v. Johnson,* 440 F.3d 832, 842 (6th Cir. 2006); *see also United States v. Baker,* ___ F.3d ___, 2006 WL 2346312, at *2 (6th Cir. 2006) ("[T]hese two standards of review are not in fact inconsistent because it is an abuse of discretion to make errors of law or clear errors of factual determinations.")

2. The Right to a Meaningful Defense

"Whether rooted directly in the *Due Process Clause of the [Fifth Amendment]* or in the *Compulsory Process or Confrontation Clause of the Sixth Amendment*, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina,* ___ U.S. ___, 126 S. Ct. 1727, 1732, 164 L. Ed. 2d 503 (May 1, 2006) (quoting *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). "While the Constitution thus prohibits the exclusion of defense evidence under rules that are designed to serve no legitimate purpose or that are disproportionate to the ends they are asserted to promote . . . the Constitution permits judges to exclude evidence that is repetitive . . . only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues." *Id.*

(internal citations and quotations omitted). Accordingly, "'[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Montana v. Egelhoff,* 518 U.S. 37, 42 (1996) (quoting *Taylor v. Illinois,* 484 U.S. 400, 410 (1988)); *see also United States v. Scheffer,* 523 U.S. 303, 308 (holding that rules of evidence only infringe on a defendant's right to present a defense where they are arbitrary or disproportionate or infringe on a weighty interest of the accused). Moreover, even where a district court erroneously excludes defense evidence, "[w]hether the exclusion of [witnesses'] testimony violated [defendant's] right to present a defense depends upon whether the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist." *Washington v. Schriver,* 255 F.3d 45, 57 (2d Cir. 2001).

3. Defendant Was Not Denied the Right to Present a Meaningful Defense

a. Exclusion of Professor Jarrell's Testimony

The exclusion of portions of Professor Jarrell's testimony was not an abuse of discretion, and accordingly, did not deny Defendant the right to present a meaningful defense. Defendant offered Professor Jarrell's testimony to support an alternative theory of events: that Defendant's friends and family learned about the merger through "leakage" and not insider trading. Importantly, Professor Jarrell was allowed to testify about leakage theory. Professor Jarrell explained that information about a buyout may

"leak" not only through an insider's improper disclosure but also through non-insiders' observations of company activity in the period leading up to a buyout. The only portion of Professor Jarrell's testimony that the district court excluded was testimony relating to the existence of trading by persons with relationships to WF directors other than Defendant, and correspondingly, a chart demonstrating such trading ("the Jarrell Chart"). The district court reasoned that the testimony and chart were not relevant and thus were inadmissible.

We believe that the district court's holding was correct. Federal Rule of Evidence 402 permits the introduction only of relevant evidence. Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. As the district court held, the excluded testimony did not make "leakage" any more likely than tipping, and thus did not make Defendant's innocence "more probable . . . than it would be without the evidence." Fed. R. Evid. 401. Professor Jarrell was not proffering testimony that the existence of trading around other WF officials made leakage a more probable explanation than tipping. Instead, Professor Jarrell planned to testify that the trading around other WF officials could have been caused by leakage. It is equally plausible, however, that the other directors tipped their relations. As the district court correctly explained, "Maybe they should have prosecuted these other people, too. Just because they didn't prosecute everybody, [doesn't make the testimony] relevant." (J.A. at 2297.)

We might have reached a different conclusion regarding relevancy if Defendant was prepared to offer proof that the sheer existence of trading around all directors made leakage a more likely theory than insider trading. Neither the record, briefs, nor arguments on appeal, however, indicate that Defendant was prepared to offer evidence that trading around numerous WF officials makes leakage a more plausible theory of information dissemination than insider trading. Although Defendant contends that leakage was more likely than insider trading, Defendant does not contend that the sheer existence of trading around other directors is proof of this. Instead, Defendant argues that the trading around the other directors was leakage, and thus the chart leads to the inference that the trading around Defendant was leakage. (Def.'s Br. 22 ("The jury was not permitted to learn that Leakage is not just an 'ivory tower' theory. It occurred around almost every WF official . . .").) As explained above, Defendant simply offered evidence that the trading around other WF officials was leakage, and consequently, the evidence does not permit an inference that the trading around other officials indicated that his family and friends learned about the merger through leakage.

Furthermore, we reject Defendant's argument, which we duly note was newly crafted on appeal, that Professor Jarrell's testimony was relevant to demonstrate other sources of tipping – the other WF directors – thereby decreasing the likelihood that Defendant tipped his family and friends. While the existence of other sources of tipping surely was relevant to Defendant's case, Professor Jarrell was not qualified to testify about these sources inasmuch as he lacked personal knowledge of them. Experts may rely on knowledge outside their own personal knowledge

when testifying on "scientific, technical, or other specialized knowledge." *United States v. Bonds,* 12 F.3d 540, 566 (6th Cir. 1994). They must rely on personal knowledge, however, when testifying on all other subjects. *See* Fed. R. of Evid. 601, 701; *United States v. Sheffey,* 57 F.3d 1419, 1428 (6th Cir. 1995). Testimony on the activities of WF employees does not require specialized knowledge, and consequently, is subject to 701's personal knowledge requirement.

b. Exclusion of the Testimony of Jehn, Adams, and Cusato

Similarly, the exclusion of the testimony of Jehn, Adams, and Cusato did not deny Defendant the right to present a meaningful defense. The district court excluded three types of evidence from Jehn, Adams, and Cusato: (1) Jehn's statement that he had heard that Yahoo contained rumors about a Kellogg buyout of WF; (2) Adam's statements recounting his conversation with Jehn about buyout rumors; and (3) statements from all three men that a WF employee tipped them off on the buyout. The first two sets of statements were properly excluded under the rule against hearsay while the exclusion of the third set of statements constituted harmless error. Because neither the Fifth nor Sixth Amendment prohibit the exclusion of hearsay unless such exclusion infringes on a weighty interest of the accused, *see Scheffer,* 523 U.S. at 330 n.17, nor require this Court to reverse a conviction for harmless evidentiary error, the exclusion of the testimony of Jehn, Adams, and Cusato did not deprive Defendant of a meaningful opportunity to present a defense.

First, both Jehn's statement that he heard that a Yahoo message board contained a rumor about the buyout and Adams' statements recounting his conversation with Jehn were properly excluded under the rule against hearsay. Under the rule against hearsay, a witness may not testify as to "statement[s] other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801 and 802. Jehn's testimony about the Yahoo statement was a recounting of a statement made outside of court and was offered to prove the matter asserted in that out of court statement, the existence of a rumor on Yahoo. Thus, Jehn's statement was hearsay. Similarly, Adams' testimony regarding his conversation about rumors with Jehn was a recounting of statements made outside of court offered to prove the matter asserted in the statement, that Adams and Jehn both heard rumors of the buyout. Accordingly, Adams' testimony was hearsay.

Defendant attempts to argue that the Yahoo statement was not hearsay by arguing that it was not offered to prove the truth of the buyout, but simply the existence of rumors. Defendant's argument misses the point; the fact that the statement was offered to prove the existence of a rumor on Yahoo is exactly what makes it hearsay. The out of court statement repeated by Jehn asserted the existence of a rumor on Yahoo, not the existence of a buyout. Thus, the statement is hearsay even if offered to prove the existence of the Yahoo rumor. It would be double hearsay if offered to prove the existence of the buyout. Importantly, Adams, who actually saw the rumor on Yahoo, was permitted to testify that there was a rumor on Yahoo about the buyout.

We further note that this testimony was not offered for the purpose of demonstrating the reason that Jehn bought WF stock, nor would it have been admissible for this purpose. Although the testimony would not have been hearsay if offered to prove Jehn's motivation, Jehn's motivation was not relevant to any issue at trial. Blackwell was not charged with tipping Jehn. Blackwell simply offered Jehn's testimony to support to support his theory that the persons he allegedly tipped could have learned of the buyout from other sources.

Second, the exclusion of the testimony of Jehn, Adams, and Cusato that they were tipped on the buyout from a WF employee was harmless, and thus, did not deprive Defendant of the right to present a defense. *Washington,* 255 F.3d at 57. Dale Twomley testified that rumors of a buyout were circulating among WF employees and Adams testified that a rumor was posted on a Yahoo message board. Thus, the jury was aware that persons other than Defendant possessed information about the buyout and conceivably tipped Defendant's family and friends. The exclusion of cumulative testimony does not impair the right to present a meaningful defense. *Holmes,* ___ U.S. ___, 126 S. Ct. at 1732.

c. Limitation on the Cross-examination of Kahl

The district court's limitation on Defendant's cross-examination of Kahl did not deprive Defendant of a meaningful opportunity to defend himself. The defense theory was that Kahl changed the date of the tip after his WF stock order tickets and phone records established that Defendant could not have tipped Kahl on September 20,

1999. The order tickets showed that Kahl bought WF stock the morning of the 20th before speaking with Defendant. Defendant raises two specific ways in which the district court limited his ability to question Kahl about the discrepancy between the date Kahl gave before the grand jury – September 20, or his birthday – and the date Kahl gave at trial – probably in the days before his birthday. First the district court sustained an objection to a question from defense counsel asking Kahl what date Kahl stated before the grand jury. Second, the district court sustained an objection to defense counsel's attempt to have Kahl to lay a foundation for Kahl's order tickets for his WF stock, which contained the date and time at which Kahl bought WF stock.

Both of the district court's rulings were correct legal applications of standard, justifiable rules of evidence, and accordingly, did not deprive Defendant of the right to present a meaningful defense. *See Egelhoff,* 518 U.S. at 42. The district court sustained the first objection because the question was repetitive. Defendant's attorney had already asked Kahl this question, and received an honest answer, on seven occasions. The district court sustained the second objection because Kahl had never seen the order tickets. Normally, Kahl's stock broker took care of the details of his stock transactions. Kahl therefore had no personal knowledge of the ticket and was not the proper witness to question about it. Fed. R. Evid. 602. Significantly, Defendant later called a stock broker to testify about the order tickets and was able to introduce the order tickets at that time.

Furthermore, Defendant exaggerates the discrepancy between Kahl's grand jury testimony and trial testimony. In reality, any discrepancy was minor and did not truly

discredit Kahl's testimony. Defendant cites the following language to emphasize how "sure" Kahl was of the September 20 date in his grand jury testimony:

> Q: So is there any doubt in your mind that you were talking to Roger Blackwell on the telephone on your birthday in 1999.
>
> A. There is no doubt.

(J.A. at 4279.) However, read in context it is clear that the "no doubt" refers to the fact that the person on the other end of the phone was Defendant and not the date of the conversation. The above quoted question and answer in context read as follows:

> Q: In addition to that over the years of your friendship with Roger Blackwell, have you spoken with him in person and on the telephone on many occasions.
>
> A: Oh, yeah.
>
> Q: As a consequence of those discussions with Roger Blackwell, did you learn to recognize his voice?
>
> A: Yes.
>
> Q: So is there any doubt in your mind that you were talking to Roger Blackwell on the telephone on your birthday in 1999.
>
> A. There is no doubt.

(J.A. at 4277-78.) Additionally, other comments by Kahl before the grand jury evidence he did not recall details. (*See* J.A. at 4279-80 ("You, know, this is – I'm trying to reput this thing together. Because the hard facts I remember well. The rest of it is all fuzz. But I believe he was calling

to wish me a happy birthday and started kidding around that I ought to eat more veggie burgers.").) Inasmuch as the district court's limitations on Defendant's cross-examination of Kahl were both proper and harmless, they did not violate Defendant's right to present a meaningful defense.

d. Limitations on the Cross-examination of Stephan-Blackwell

Finally, the district court's limitations on Defendant's cross-examination of Stephan-Blackwell did not deprive Defendant of a meaningful opportunity to defend himself because the limitations were harmless. Defendant argues that the district court erred in limiting Defendant's questions to Stephan-Blackwell on (1) the timing of her immunity agreement; (2) her own understanding of her immunity agreement; (3) and her relationship with Terry Lundgren. According to the Defendant, these questions were necessary to prove bias and attack Stephan-Blackwell's credibility. In particular, Defendant aimed to challenge Stephan-Blackwell's claim that she lied to the SEC to protect Blackwell because she loved him.

Information on all three of these issues came out during Stephan-Blackwell's cross-examination, rendering her bias more than apparent. On cross-examination, Stephan-Blackwell admitted that she was dating Lundgren in 2003, at which time she was still lying to the SEC about her involvement in this case. She further admitted that she approached the government about immunity only after she separated from Defendant and that shortly after she received immunity she became engaged to Lundgren. Moreover, Defendant raised all

these issues in his closing. Because the limitations placed on Defendant's cross-examination of Stephan-Blackwell did not deprive Defendant of the ability to attack Stephan-Blackwell's credibility and reveal any potential bias, the limitations cannot be said to have deprived Defendant of the opportunity to defend himself. *Boggs v. Collins,* 226 F.3d 728, 739 (6th Cir. 2000) (holding that Defendant's right to cross-examine a witness for bias or motivation to lie is not grounds for reversal where "the jury had enough information, despite the limits placed on otherwise permitted cross-examination, to assess the defense theory of bias or improper motive.").

e. Cumulative Effect of the District Court's Evidentiary Rulings

In addition to arguing that each of the district court's evidentiary rulings amounted to independent violations of his right to present a defense, Defendant also argues that the cumulative effect of the district court's evidentiary errors violated his right to present a meaningful defense. We disagree. Despite Defendant's numerous challenges to the district court's evidentiary rulings, only two of those rulings can possibly be considered erroneous: the district court's limitations on the cross-examination of Stephan-Blackwell and the district court's exclusion of testimony that a WF employee tipped Jehn, Adams, and Cusato. Taken together, these rulings were not so prejudicial that they denied Defendant of a meaningful opportunity to present a defense.

In asking whether Defendant was ultimately denied a meaningful defense, we look to whether the improperly excluded evidence (or limited cross-examination) would

have created a reasonable doubt as to Defendant's guilt. *Washington,* 255 F.3d at 57. In the instant case, permitting Defendant to present testimony that a WF employee tipped Jehns, Adams, and Cusato about the buyout and to cross-examine Stephan Blackwell about the precise date she signed the immunity agreement would not have created a reasonable doubt as to Defendant's guilt. First, the testimony that a WF employee tipped Jehns, Adams, and Cusato was not particularly probative. The existence of this tipper did not truly cast doubt on Defendant's guilt inasmuch as Defendant offered no evidence connecting the WF tipper to the persons Defendant allegedly tipped. Second, while Defendant was unable to establish the precise date on which Stephan-Blackwell signed the immunity agreement, Defendant was able to establish the relevant time frame in which Stephan-Blackwell signed the immunity agreement: after leaving Defendant and beginning a relationship with another man. Third, there was extensive evidence of Defendant's guilt, including testimony from Defendant's good friend, Kahl, that Defendant tipped him, testimony from Defendant's ex-wife that Defendant tipped her, and the sheer number of family and friends of Defendant who bought WF stock in the relevant time period. Therefore, we find that even viewing the alleged evidentiary errors cumulatively, Defendant was not denied the opportunity to present a meaningful defense.

B. *Brady* Claim

The government belatedly provided three documents to Defendant that form the basis for Defendant's *Brady* Claim: (1) a letter to the Stephans' attorney, James E. Phillips, setting forth the government's understanding of the Stephans' immunity agreement ("the Stephans' immunity

letter"); (2) the FBI's notes from an interview with Sigrid McFetridge ("the McFetridge Report"); and (3) the FBI's notes from an interview with Benoit, the vice-president of Kellogg ("the Benoit Report"). According to Defendant, the government's belated production of the Stephans' immunity letter and the McFetridge Report rendered him unable to effectively cross-examine Stephan-Blackwell by depriving him of knowledge of the interlocking nature of the Stephans' immunity agreement with Stephan-Blackwell's testimony and the nature of Stephan-Blackwell's role in McFetridge's trading. Specifically, the Stephans' immunity letter made it clear that their immunity was dependant on Stephan-Blackwell's cooperation, which, according to Defendant, gave Stephan-Blackwell an additional incentive to lie. The McFetridge Report states that Stephan-Blackwell tipped McFetridge, encouraged her to buy WF stock, and coached her to lie to law enforcement. Defendant argues that the belated production of the Benoit report deprived him of the exculpatory statements by Benoit regarding the interest of several large companies in WF prior to the Kellogg buyout. Defendant also makes the perfunctory argument that the documents would have altered his voir dire strategy and opening statement, and caused him to subpoena the Stephans before the Stephans left the country. We are not convinced by any of Defendant's arguments.

1. Standard of Review

We review a district court's decision to deny a mistrial for delayed disclosure of evidence for abuse of discretion. *United States v. Davis,* 306 F.3d 398, 420 (6th Cir. 2002).

2. *Brady v. Maryland*

"*Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or innocence.'" *United States v. Bagley,* 473 U.S. 667, 675 (1985) (quoting *Brady v. Maryland,* 373 U.S. 83, 87(1963)). Evidence is favorable to the accused if it exculpates the accused or enables the accused to impeach witnesses. *Id.* at 676. Evidence is material to guilt or innocence "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682.

3. No *Brady* Violation Occurred

No *Brady* violation occurred in this case. The Defendant received all three documents during trial. *United States v. Blood,* 435 F.3d 612, 627 (6th Cir. 2006) ("*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to a complete failure to disclose" and [] a "[d]elay only violates *Brady* when the delay itself causes prejudice") (quotation marks and citation omitted). Furthermore, the district court expressly granted Defendant the opportunity to re-cross examine Stephan-Blackwell and took no action to prevent Defendant from calling Benoit as a witness. Accordingly, Defendant had the opportunity to examine both Stephan-Blackwell and Benoit in light of the disclosed documents and any prejudice resulting from Defendant's failure to do so is not attributable to the government's violation of the principles set forth in *Brady. See United States v. Delgado,* 350 F.3d

520 (6th Cir. 2003) (citing *United States v. Corrado,* 227 F.3d 528, 538 (6th Cir. 2000)).

Defendant's argument that the belated disclosure of the documents prejudiced the entire defense, including voir dire and the opening statement is meritless. First, Defendant presents his argument on this issue in a perfunctory manner, providing no explanation of how the disclosed material would have altered his defense. Second, the pertinent information in the disclosed documents was, for the most part, already available to Defendant. *See Bagley,* 473 U.S. at 676 (holding that there is no *Brady* violation unless a reasonable probability exists that the disclosed evidence would have altered the result of trial). Defendant was already aware that the Stephans' immunity interlocked with the testimony of Stephan-Blackwell prior to trial. In fact, Defendant mentioned the interlocking nature of the immunity agreement in his opening statement and cross-examined Stephan-Blackwell on this issue. Thus, if Defendant had wanted to subpoena the Stephans because of the interlocking nature of the immunity agreements, he would have done so. Second, the record indicates that Defendant maintained that Stephan-Blackwell was responsible for tipping her cousin, Sigrid McFetridge, prior to the disclosure of the McFetridge report. Accordingly, we fail to see how McFetridge's admission of the tipping would have altered Defendant's trial strategy. Importantly, Stephan-Blackwell admitted that she tipped McFetridge at trial. The McFetridge Report was therefore cumulative. Third, it was also Defendant's trial strategy from the beginning to prove that WF was an obvious potential target for a buyout by a larger company. Professor Jarrell testified as much. There is thus no possibility that the earlier disclosure of the Benoit Report

would have altered Defendant's trial strategy. Consequently, we hold that Defendant's *Brady* claim is meritless.

C. Sufficiency of the Evidence

1. Preservation

Although Defendant's statement of the issues raises insufficiency generally, Defendant only makes actual insufficiency arguments in his brief on appeal as to the conspiracy convictions, the obstruction of an agency proceeding conviction, and the false statement convictions. Therefore, all other sufficiency challenges are waived, *see Layne,* 192 F.3d at 566, and we address only the conspiracy, obstruction of an agency proceeding, and false statement convictions. We find that there was sufficient evidence to convict Defendant on all counts.

2. Standard of Review

This Court reviews a "challenge to the sufficiency of the evidence by considering the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *United States v. Spearman,* 186 F.3d 743, 746 (6th Cir. 1999). "'Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt.'" *Id.* (quoting *United States v. Vannerson,* 786 F.2d 221, 225 (6th Cir. 1986)). "Furthermore, it is well-settled that uncorroborated testimony of an accomplice may support a conviction in federal court." *Id.*

3. Sufficient Evidence Exists to Convict Defendant of Conspiracy

Defendant contends that there is insufficient evidence of both conspiracy to insider trade and conspiracy to obstruct justice. His primary argument is seemingly that the act of "tipping" does not evidence a conspiracy to insider trade inasmuch as a conspiracy requires proof of an agreement to act jointly for a common purpose and the act of tipping does not evidence an agreement. Unfortunately for Defendant, there is sufficient evidence of at least two such agreements to trade on insider information: one with the Stephan family and one with Kelley Hughes and Kevin Stacey. Similarly, there is sufficient evidence of an agreement between Defendant, Stephan-Blackwell, and the Stephans to obstruct an agency proceeding.

a. The Law of Conspiracy

Section 371 of Title 18 of the United States Code makes it illegal for "two or more persons [to] conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." To prove conspiracy, the government must establish: (1) the existence of an agreement to violate the law; (2) knowledge and intent to join the conspiracy; and (3) an overt act constituting actual participation in the conspiracy. *See, e.g., United States v. Jamieson,* 427 F.3d 394, 402 (6th Cir. 2005); *United States v. Martinez,* 430 F.3d 317, 330 (6th Cir. 2005). "A tacit or material understanding among the parties to a conspiracy is sufficient to establish the agreement [, and] conspiracy may be inferred from circumstantial evidence which may reasonably be interpreted as participation in a common

plan." *United States v. Walls,* 293 F.3d 959, 967 (6th Cir. 2002) (internal citations omitted).

b. Conspiracy to Commit Insider Trading

First, there is sufficient evidence of an agreement to trade on insider information between Defendant, Stephan-Blackwell, and the Stephans. Defendant, knowing that tipping was illegal, encouraged Stephan-Blackwell to share the tip with the Stephans. Defendant then gave the Stephans money to buy WF stock, which the Stephans subsequently used to purchase WF stock. Based on this evidence, a reasonable juror, viewing the evidence in the light most favorable to the prosecution, could conclude beyond a reasonable doubt that Defendant, Stephan-Blackwell, and the Stephans agreed to work together to help the Stephans trade on insider information.

Second, there is sufficient evidence that Defendant agreed with Hughes and Stacey to trade on inside information. Hughes, a friend and employee of Defendant, bought huge amounts WF stock in the three month period after Defendant learned of the buyout and before the buyout occurred. She made these purchases, in part, with a $30,000 loan from the Defendant. These facts permit the inference that Hughes, Stacey, and Defendant agreed to work together to help Hughes violate the law, and a reasonable juror, viewing the evidence in the light most favorable to the prosecution, could conclude the existence of such an agreement was proven beyond a reasonable doubt.

c. Conspiracy to Obstruct An Agency Proceeding

Third, there is also sufficient evidence that Defendant agreed with Stephan-Blackwell and the Stephans to obstruct an agency proceeding. Stephan-Blackwell testified that she and Defendant agreed not to volunteer information on and to "obscure" relationships with persons who bought WF stock. Thereafter, Stephan-Blackwell coached the Stephans to lie and deleted contacts from RBA's database with Defendant's knowledge. Knowing that Stephan-Blackwell had deleted the information, Defendant nonetheless failed to correct the deletions before giving the documents to the SEC. Based on this information a reasonable juror could find beyond a reasonable doubt that Defendant, Stephan-Blackwell, and the Stephans agreed to work together to obstruct agency proceedings. Accordingly, Defendant's conspiracy convictions should stand.

4. Sufficient Evidence Exists to Convict Defendant of Making False Statements

The government presented sufficient evidence to allow a reasonable juror to convict Defendant on both counts of making false statements. Section 1001 of Title 18 prohibits any person from (1) "knowingly and wilfully"; (2) "mak[ing] any materially false, fictitious, or fraudulent statement or representation"; (3) "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." Defendant admits that he both testified before the SEC, and had his lawyer send a letter to the SEC stating that he never disclosed any information about the Kellogg-WF buyout. Stephan-Blackwell and Kahl testified that Defendant

informed them of the buyout. Accordingly, a reasonable juror could find that Defendant lied, with the requisite intent, to the SEC on two occasions: once when testifying, and once when his attorney wrote to the SEC.

5. Sufficient Evidence Exists to Convict Defendant of Obstructing an Agency Proceeding

Similarly, the government presented sufficient evidence to allow a reasonable juror to conclude that Defendant's involvement in his wife's deletions of RBA's contact list directly after receiving an SEC subpoena constituted obstruction of an agency proceeding. Section 1505 of Title 18 renders obstruction of an agency proceedings illegal. It states:

> Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so . . . shall be fined under this title, imprisoned not more than 5 years . . . or both.

Thus, to be convicted of obstruction of agency proceedings, a defendant must have 1) intended to interfere with the proceedings and 2) withheld, misrepresented, removed from any place, concealed, covered up, destroyed, mutilated, altered or falsified any documentary material, answers to written interrogatories, or oral testimony. *See*

id. Inasmuch as a reasonable jury could find that Defendant, acting with the requisite intent, misrepresented RBA's contact list to the SEC, it could find that Defendant obstructed an agency proceeding. First, Stephan-Blackwell testified that she and Defendant agreed to obscure their relationships to WF stock buyers, thereby providing a reasonable juror with evidence of Defendant's intent to interfere. Second, Stephan-Blackwell testified that Defendant was present when she deleted the RBA records and that Defendant did not object. As the government correctly points out, Defendant, knowing of the deletions, essentially misrepresented the contact list to the SEC by failing to correct them. *See United States v. Laurins,* 857 F.2d 529, 536 (9th Cir. 1988) (holding that the submission of false documents to IRS violated § 1505). Thus, there was sufficient evidence to allow a jury to find that Defendant's involvement in the deletions amounted to obstruction of an agency proceeding.

D. Variance

1. Standard of Review

This Court reviews *de novo* whether the indictment varied from the proof presented at trial. *United States v. Solorio,* 337 F.3d 580, 589 (6th Cir. 2003). A variance does not constitute reversible error unless it affects a substantial right of the defendant. *Id.* at 590. In this case, Defendant's substantial rights were not affected.

2. Defendant's Substantial Rights Were Not Affected

A variance occurs when an indictment alleges one large conspiracy but the evidence at trial establishes

multiple conspiracies. *Kotteakos v. United States,* 328 U.S. 750, 756 (1946). A variance constitutes reversible error if it affects a substantial right of the defendant. *Id.* at 757, 766. A defendant's substantial rights are affected if the defendant is convicted on evidence "unrelated to his own alleged activity." *United States v. Geibel,* 369 F.3d 682, 693 (2d Cir. 2004). Accordingly, the inquiry into whether a variance constitutes reversible error focuses on whether a danger exists that the defendant was convicted based on evidence of a conspiracy in which the defendant did not participate ("guilt transference"). *United States v. Mack,* 837 F.2d 254, 258 (6th Cir. 1988). Typically, the danger of guilt transference "can be cured with a cautionary instruction to the jury that if it finds multiple conspiracies, evidence relating to one conspiracy cannot be considered in examining another conspiracy." *Id.* However, the more evidence presented at trial that is unrelated to the defendant's conduct, or a conspiracy in which the defendant took part, the less likely instructions are to cure the danger of guilt transference. With this in mind, courts have considered the number of conspiracies the evidence establishes, the number of non-conspiratorial co-defendants tried with defendant, and the size of the conspiracy alleged in the indictment in determining whether a variance was prejudicial. *Kotteakos,* 328 U.S. at 766 (contrasting the two conspiracies established in *Berger v. United States,* 295 U.S. 78 (1935), with the 8 conspiracies established in that case); *Geibel,* 369 F.3d at 693.

We need not decide whether a variance occurred in the instant case, because assuming a variance did occur, it did not affect Defendant's substantial rights. As discussed above, a variance only affects a defendant's substantial

rights if it creates a danger of improper guilt transference from one defendant to another. In this case, there was no danger of improper guilt transference to Blackwell from any other defendant, *i.e.,* Voss, Jack, Hughes, and Stacey. The trial court instructed the jury that it could not consider evidence of one defendant's actions, including Voss, Jack, Hughes, and Stacey, against another defendant, including Blackwell, unless the jury first found the defendants to be co-conspirators, stating:

> However, statements of any conspirator which are made before its existence or after its termination, or which were not made in furtherance of the conspiracy, may be considered as evidence only against the person marking [sic] the statement. Likewise, if acts were done or statements were made by someone whom you do not find to be a member of the conspiracy, they may be considered by you as evidence only against the person who did the acts or made the statement.

(J.A. at 3839-40.) We presume the jury followed these instructions. *See, e.g., Roberts v. Carter,* 337 F.3d 609, 615 (6th Cir. 2003). Accordingly, we must conclude that the jury did not improperly "transfer guilt" to Blackwell from the other defendants without first finding that the defendant in question conspired with Blackwell.

Relatedly, Defendant argues that the prosecution intentionally varied the indictment from the proof at trial in order to render otherwise inadmissible evidence admissible. Specifically, Defendant argues that the testimony of Stephan-Blackwell and Kahl, regarding Defendant's tipping of the Stephans and Kahl respectively,[2] was propensity

[2] Defendant was not charged with tipping the Stephans or Kahl.

evidence used to support other substantive insider trading charges. According to Defendant, the indictment alleged a single conspiracy listing Stephan-Blackwell and Kahl as co-conspirators for the sole purpose of rendering this propensity evidence admissible.

We find Defendant's argument to be without merit. In the first place, Stephan-Blackwell's testimony establishes the existence of a conspiracy and would have been admissible to prove the smaller conspiracy had there been no variance. Next, the testimony of both Stephan-Blackwell and Kahl regarding Defendant's tipping practices was relevant to the false statement and obstruction of an agency proceeding charges. Their testimony proved that, contrary to Defendant's SEC and trial testimony, Defendant tipped individuals on Kellogg's planned buyout of WF.

E. Jury Instructions

Defendant argues that the district court's jury instructions constitute reversible error. Specifically, Defendant offers the following arguments as grounds for reversal: (1) the instructions on multiple conspiracies misled the jury by allowing it to convict Defendant of conspiracy if the jury found agreement between Defendant and any alleged co-conspirator; (2) the instructions on conspiracy omitted the phrases "That is the key" and "unindicted co-conspirators"; (3) the instructions included language not found in the Sixth Circuit pattern jury instructions; (4) certain limiting instructions on SEC testimony were confusing; and (5) the district court failed to give the so-called "two inference" jury instruction. For the reasons set forth below, we reject Defendant's arguments.

1. Preservation

Defendant failed to preserve several of the alleged errors in the jury instructions for this Court's review. Specifically, Defendant's brief on appeal fails to offer any argument in support of his contentions that the omission of the phrases "That is the key" and "unindicted co-conspirators," and the use of language not set forth in pattern jury instructions rendered the jury instructions improper. Similarly, Defendant fails to explain in what way the limiting instructions on SEC testimony were confusing. Accordingly, we decline to review these issues. *Layne,* 192 F.3d at 566.

Defendant's remaining arguments – that the instruction on multiple conspiracies were improper and that the district should have given the "two inference" jury instruction – are, however, preserved for our review. Defendant objected to jury instructions on these grounds in the trial court, *United States v. Carmichael,* 232 F.3d 510, 523 (6th Cir. 2000), and developed them in his brief on appeal, *Layne,* 192 F.3d at 566.

2. Standard of Review

This Court "review[s] jury instructions as a whole to determine if they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision and will reverse a jury verdict on account of instructional error only in situations where the instruction, viewed as a whole is confusing, misleading, and prejudicial." *Romanski v. Detroit Entm't, LLC,* 428 F.3d 629, 641 (6th Cir. 2005) (internal quotation marks and citation omitted).

3. Multiple Conspiracy Instructions

The district court's charge on multiple conspiracies was a correct statement of law and was not confusing, misleading, or prejudicial. The district court clearly stated that the jury must find that Defendant participated in the conspiracy alleged in the indictment to convict Defendant of conspiracy; however, the district court also made clear that the jury need not find that Defendant conspired with all co-conspirators alleged in the indictment to determine that Defendant participated in that conspiracy. The trial court's instructions read in pertinent part as follows:

> Now, the government is not required to prove that all of the people named in the indictment were members of the scheme or the conspiracy, so long as you find that at least two persons, one of them being the defendant, were participants in the conspiracy alleged in the indictment.
>
> To convict any one of the defendants of a conspiracy charge, the government must convince you beyond a reasonable doubt that the defendant was a member of the conspiracy charged in the indictment. The government must prove beyond a reasonable doubt that the defendant knowingly and intentionally became a member of the single conspiracy alleged in the indictment as opposed to some other conspiracy. Proof that the defendant was only a member of some other conspiracy is not enough to convict. However, proof that a defendant was a member of some other conspiracy would not prevent you from returning a guilty verdict if the government also proved that the defendant was also a member of the conspiracy charged in the indictment.

(J.A. at 3839, 3849.)

The first portion of this instruction is a correct statement of law. A jury need not find that a defendant conspired with all the alleged co-conspirators in order to convict a defendant of conspiracy. *See United States v. Sandy,* 605 F.2d 210, 217 (6th Cir. 1979) (holding the acquittal of several jointly tried co-defendants in a conspiracy case was not grounds for reversing the conviction of a co-defendant and alleged co-conspirator); *see also United States v. Thomas,* 348 F.3d 78, 84 n.3 (10th Cir. 2003) (discussing similar cases).

Similarly, the second part of this instruction is not erroneous and, in fact, mirrors in substance, the Sixth Circuit Pattern Jury Instructions:

> (3) To convict any one of the defendants of the conspiracy charge the government must convince you beyond a reasonable doubt that the defendant was a member of the conspiracy charged in the indictment. If the government fails to prove this, then you must find the defendant not guilty of the conspiracy charge, even if you find that he was a member of some other conspiracy. Proof that the defendant was only a member of some other conspiracy is not enough to convict. (4) But proof that a defendant was a member of some other conspiracy would not prevent you from returning a guilty verdict if the government also proved that the defendant was a member of the conspiracy charged in the indictment.

Sixth Circuit Pattern Jury Instructions § 3.08(3)-(4) (2005). As a comparison of the two instructions evidences, only one sentence of the second portion of the trial court's instruction differs from the pattern jury instructions. Thus, without more, we cannot say that the trial court's instruction was either misleading or erroneous.

4. Two Inference Instructions

Similarly, the district court's decision not to give Defendant's "two inference" instruction does not constitute reversible error. The district court's actual instruction contained language substantially similar to the proposed instruction. Defendant proposed the following instruction to follow the district court's explanation of the difference between direct and circumstantial evidence:

> Circumstantial evidence alone is insufficient to convict a defendant if the circumstantial evidence would support either of two reasonable probabilities – that a defendant is innocent or that the same defendant is guilty of a particular crime charged. Stated differently, if, based on circumstantial evidence alone, you could find a defendant either innocent or guilty, then you must find that defendant innocent. Circumstantial evidence that requires the jury to make a leap of faith or engage in speculation or conjecture in order to sustain a conviction is not valid circumstantial evidence, and it may not be used to find a defendant guilty.

(J.A. at 367.) In defining the reasonable doubt burden of proof, the district court instructed the jury:

> Of course a defendant is never to be convicted on mere suspicion or mere conjecture .... So if the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, and the other of guilt, then of course the jury should adopt the conclusion of innocence.

(J.A. at 3774.) Both instructions informed the jury that where two reasonable conclusions exist – innocence or guilt – the jury may not convict the defendant. Thus,

Defendant's proposed instruction would not have added any value to the jury charge.

Moreover, the instruction proposed by Defendant was itself erroneous. First, the proposed instruction's undue focus on circumstantial evidence improperly implies that the circumstantial evidence is weaker than direct evidence. *See United States v. Prince,* 214 F.3d 740, 746 (6th Cir. 2000) (holding that direct and circumstantial evidence are to be given the same weight when reviewing the sufficiency of the evidence). Additionally, the proposed instruction improperly states that "if, based on circumstantial evidence alone, you could find a defendant either innocent or guilty, then you must find that defendant innocent." (J.A. at 367.) By omitting any reference to reasonable probability, this statement improperly raises the burden from beyond a *reasonable* doubt to beyond *all possible* doubt. Consequently, this Court has held similar instructions erroneous. In *United States v. Scott*,[3] 578 F.2d 1186, 1191-92 (6th Cir. 1978) (quoting *United States v. Holland*, 348 U.S. 121, 139-40 (1954)), the Court rejected an instruction reading "where the Government's evidence is wholly circumstantial it must be such as to exclude every reasonable hypothesis [as opposed to probability] other than that of guilt." Inasmuch as a district court does not err in refusing to give an incorrect jury instruction, we hold that the district court's failure to give Defendant's proposed "two inference" jury instruction was not improper.

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[3] Although two lines of case law exist on this issue, the earlier and ultimately prevailing view is contained in *Scott.* 578 F.2d at 1192 (tracing the conflict in the case law).

F. Jury Interrogatories

Defendant argues that the alleged errors discussed in the previous two sections, namely the variance and jury instructions, were compounded by the district court's refusal to use jury interrogatories or a "special verdict form," requiring the jury to find each element of conspiracy separately before convicting Defendant of conspiracy. We disagree.

1. Standard of Review

This court reviews a district court's decision to use jury interrogatories for an abuse of discretion. *Safeco Ins. Co. v. City of White House, Tenn.*, 191 F.3d 675, 681 (6th Cir. 1999). In this case, the district court did not abuse its discretion in declining to use jury interrogatories.

2. The District Court Did Not Abuse Its Discretion

"In general, special verdicts are not favored [in criminal cases] and 'may in fact be more productive of confusion than of clarity.'" *United States v. Wilson*, 629 F.2d 439, 444 (6th Cir. 1980) (quoting 8A *Moore's Federal Practice and Procedure* § 31.02(3)). The general rule against special verdicts in criminal cases has long been considered to prevent the courts from:

> invad[ing] the province of the jury and infring[ing] on its power to deliberate free from legal fetters; on its power to arrive at a general verdict without having to support it by reason or by report of its deliberations; and on its power to follow instructions of the court.

Id. at 443 (citation omitted). In other words, the rule against special verdicts seemingly stems from the common law right of the jury to nullify without being reversed by the king's judges. *See id.* (discussing numerous cases and articles); *see also United States v. Reed,* 147 F.3d 1178, 1180 (9th Cir. 1998) ("This rule is fashioned to protect the rights of the criminal defendants by preventing the court from pressuring the jury to convict."). Thus, this rule seemingly exists to protect the rights of the defendant.

While we question the applicability of a rationale against special verdicts to protect defendants in cases where the defendant requests the special verdict, we also recognize that there is no real reason, and no case law support, for abandoning the general rule in this case. First, Defendant has cited no authority for the proposition that a judge's failure to use jury interrogatories or a special verdict constitutes reversible error. Specifically, Defendant relies on two types of cases: one in which courts of appeals *uphold* the district court's decision to use a special verdict, *see Reed,* 147 F.3d at 1181-82; *United States v. Stonefish,* 402 F.3d 691, 699 (6th Cir. 2003); *United States v. Walker,* 97 F.3d 253, 255-56 (8th Cir. 1996), and one in which courts of appeals require lower courts to submit facts to the jury that will be used to increase a defendant's sentence beyond the statutory maximum for the more general crime set forth in the indictment, *see, e.g., United States v. Randolph,* 230 F.3d 243, 252 (6th Cir. 2000) (discussing *United States v. Dale,* 178 F.3d 429 (6th Cir. 1999)). This Court's refusal to reverse a judgment for the use of a special verdict cannot be equated with a requirement that lower courts use special verdicts. In fact, the specific holding of *Stonefish* was that the use of a special verdict did not constitute

plain error. Such a holding should not be interpreted as an endorsement of special verdicts. The sentencing line of cases is equally inapplicable. They address the implications of a defendant's right to have a jury decide all facts that increase his or her sentence beyond the statutory maximum. *See Dale,* 178 F.3d at 422-33 (collecting cases). Interrogatories regarding the existence of such facts must be submitted to the jury. *Id.* Defendant, however, did not request the finding of specific facts, separate from the elements of his crime, that would increase his statutory minimum. Even if he had, however, *Randolph* makes it clear that the failure to use a special verdict form does not constitute reversible error. 230 F.3d at 252. Instead, the failure to use the special verdict form simply limits the sentence the trial court may impose. *Id.*

Second, Defendant's concerns regarding the necessity of a special verdict are adequately addressed through an assessment of the sufficiency of the evidence and variance. Defendant is purportedly concerned with the multiple conspiracy issue: whether the jury found that he was involved in the conspiracies alleged in the indictment or some other conspiracy. Although the evidence presented at trial admits the possibility of multiple insider trading conspiracies as opposed to one large insider trading conspiracy, the evidence presented against Defendant would place him squarely within the insider trading conspiracy alleged in the indictment. In other words, there is a possibility that the jury determined that Defendant conspired with only some of the alleged co-conspirators, namely Stephan-Blackwell and her parents, and that Hughes and Stacey formed their own separate conspiracy. Even if this were true, however, Defendant would nonetheless be guilty of the conspiracy alleged in the indictment.

Accordingly, we will not vacate Defendant's conviction simply because the district court declined to use jury interrogatories or a special verdict to determine with which persons Defendant conspired.

G. The Juror Lip-Reading Incident

Defendant claims that his conviction should be reversed due to alleged juror misconduct during the jury's deliberations. Shortly after Defendant's trial, the *Columbus Monthly* published an interview with a juror in Defendant's case, Joanne Toftner. According to the story in the *Columbus Monthly,* Toftner stated that three jurors witnessed Defendant mouth "I hate you" to Stephan-Blackwell while Stephan-Blackwell was testifying for the prosecution. The three jurors purportedly informed the other jurors of their recollections of the incident during deliberations. Toftner is further quoted as stating that, in light of the fact that three jurors witnessed Defendant mouth "I hate you," Defendant's denial of the incident on cross-examination "virtually sealed [his fate] from my perspective." (J.A. at 972.) Believing that the *Columbus Monthly* article constituted "new evidence," Defendant moved for a new trial on the ground that the juror's conduct violated his Sixth Amendment right to confront witnesses against him. The district court denied the motion, finding that the article was not "new evidence."

Defendant's claim on appeal essentially encompasses what he believes to be two distinct district court errors: (1) the decision to allow the prosecution to cross-examine Defendant on the mouthing incident; and (2) the district court's denial of Defendant's motion for a new trial in light

of newly discovered evidence, the *Columbus Monthly* article. We affirm both rulings of the district court.

1. Standard of Review

Both a district court's evidentiary ruling and a district court's decision denying a defendant a new trial based on newly discovered evidence are reviewed for abuse of discretion. *Schreane,* 331 F.3d at 564; *Morales v. Am. Honda Motor Co.,* 151 F.3d 500, 506 (6th Cir. 1998). "An abuse of discretion occurs when the district court relies on clearly erroneous findings of fact, improperly applies the law, [] uses an erroneous legal standard," or where the district court's decision is clearly arbitrary. *In re Brown,* 342 F.3d 620, 633 (6th Cir. 2003) (citation omitted); *see Tisdale v. Fed. Express Corp.,* 415 F.3d 516, 525 (6th Cir. 2005).

2. Cross-Examination

"[S]poliation evidence, including evidence that defendant attempted to bribe and threaten[] a witness, is admissible to show consciousness of guilt." *United States v. Mendez-Ortiz,* 810 F.2d 76, 79 (6th Cir. 1986) (collecting cases). Furthermore, a district court is permitted to allow evidence of threats to a witness to be admitted even if the district court is not certain that such threats occurred. *United States v. Maddox,* 944 F.2d 1223, 1230 (6th Cir. 1991). Witness intimidation may take many forms. To determine whether conduct or a statement actually constitutes an attempt to intimidate requires factual determinations that the district court is in the best situation to assess. A certain relationship between two parties could render the statement "I hate you" a form of psychological

intimidation. We decline to second guess the district court's conclusion that, in the circumstances presented in this case, mouthing "I hate you" constituted an attempt at witness intimidation. Accordingly, we hold that the district court did not abuse its discretion in allowing the cross-examination.

3. Motion for a New Trial

Similarly, the district court did not abuse its discretion in denying Defendant's motion for a new trial based on newly discovered evidence pursuant to Rule 33. To prevail on a motion for a new trial based on newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure, a defendant must establish: "(1) the new evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal." *United States v. Glover,* 21 F.3d 133, 138 (6th Cir. 1994) (citing *United States v. O'Dell,* 805 F.3d 637, 640 (6th Cir. 1986)). In this case, Defendant presented no new evidence likely to produce an acquittal, and accordingly, was not entitled to a new trial based on new evidence. A juror's conduct during deliberations is not evidence likely to produce acquittal at a new trial because it would not be admissible. Rule 402 of the Federal Rules of Evidence permits only "relevant" evidence, which is defined by Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more likely than not." Inasmuch as juror conduct has no tendency to make Defendant more or less guilty, it is not relevant to a trial on Defendant's guilt.

Despite the fact that Defendant styled his motion as one for a new trial pursuant to Rule 33 on the basis of newly discovered evidence, we presume that Defendant intended to move for a new trial in the interests of justice more generally, offering his "new evidence" as evidence of the need for a new trial rather than as evidence in support of his innocence. Even if we construe Defendant's motion as one for a new trial in the interests of justice, however, Defendant would not be entitled to relief. Confrontation Clause violations are subject to harmless error analysis and do not constitute reversible error unless they "had substantial and injurious effect or influence in determining the jury's verdict." *Doan v. Brigano,* 237 F.3d 722, 736 (6th Cir. 2001), *overruled on other grounds by Wiggins v. Smith,* 539 U.S. 510 (2003). Assuming without deciding that actions of the three jurors in the instant case violated Defendant's Sixth Amendment right to confront witnesses against him, the violation was harmless. Defendant's ex-wife and best friend both testified that Defendant tipped them on the buyout and then lied about it, and numerous friends and relations of Defendant bought enormous amounts of stock in the three month period after Defendant learned of the buyout and before the buyout actually occurred. In light of the overwhelming evidence of Defendant's guilt, we do not believe that the alleged juror misconduct had a substantial and injurious effect on the jury's verdict.

To show that the juror misconduct was not harmless, the Defendant improperly relies on the *Columbus Monthly* article, which quotes one juror as stating that, after discussing Defendant's denial of mouthing "I hate you," Defendant's "'fate was virtually sealed from my perspective,'" J.A. at 972). First, Federal Rule of Evidence 606(b)

prohibits the introduction of this statement or any similar statement to impeach the jurors' verdict. Although a juror may testify about extraneous, prejudicial information brought into the deliberations, the juror may not testify about his or her own mental processes, *i.e.*, how the jury reached his or her verdict. *Doan,* 237 F.3d at 732. The quote relied upon to prove prejudice clearly states that the denial affected the juror's personal "perspective." (J.A. at 972.) Thus, the statement constitutes inadmissible evidence of a juror's mental impressions. Moreover, the statement does not provide any basis for holding a hearing on the issue of prejudice because no jurors' mental impressions are admissible to prove such prejudice. Fed. R. Evid. 606(b). In other words, although federal courts may consider juror testimony to determine whether an error actually occurred, federal courts must determine whether error was harmless from the perspective of the rational juror, not from the perspective of the individual jurors in a particular case. *See Doan,* 237 F.3d at 736 (applying traditional harmless error analysis to juror misconduct case). Second, the article actually suggests that the incident was not prejudicial. The juror also informed the *Columbus Monthly* that "the jury found the testimony and evidence to be 'pretty straightforward' " and that "she and other members of the jury found Jack Kahl's testimony compelling." (J.A. at 972.) These comments indicate that the jurors' misconduct, if any, was harmless because the jurors would have convicted Defendant regardless of whether any misconduct actually occurred.

H. Cumulative Error

Defendant argues that even if each of the alleged errors discussed above does not individually constitute

reversible error, the cumulative effect of such errors rendered his trial fundamentally unfair in violation of due process. Because we believe that Defendant received a fair trial, we affirm the district court's order of conviction.

As this Court has held on previous occasions, "[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." *Walker v. Engle,* 703 F.2d 959, 963 (6th Cir. 1983); *see also United States v. Hines,* 398 F.3d 713, 719 (6th Cir. 2005) (citing *Walker*). In the instant case, however, the cumulative prejudice of trial errors did not render Defendant's trial fundamentally unfair. As discussed in conjunction with Defendant's other arguments on appeal, the only errors that even arguably occurred at Defendant's trial were the exclusion of witness testimony about rumors, a slight variance between the indictment and the proof at trial, improper limits on the cross-examination of Stephan-Blackwell, and potential juror misconduct in the form of improper testimony during deliberations. Defendant's remaining allegations of error are meritless. Considering only the exclusion of the rumor testimony, the alleged variance, the limits on Stephan-Blackwell's cross examination, and the alleged juror misconduct, we do not find any prejudice rendering Defendant's trial fundamentally unfair. As previously discussed, the testimony regarding rumors was cumulative of other testimony, the limitations on the cross-examination of Stephan-Blackwell did not impair Defendant's ability to conduct his defense, any variance was harmless because jurors are presumed to follow instructions, and any juror misconduct was unlikely to have truly affected the guilty verdict. Moreover, as should be clear at this point, the evidence of Defendant's

guilt was overwhelming. His ex-wife and his good friend both testified that he tipped them and lied to the SEC. Additionally, numerous friends and relations of Defendant bought enormous amounts of stock in the three month period between Defendant's learning of the pending buyout and its occurrence. Accordingly, we affirm Defendant's convictions.

I. Defendant's Fine

Defendant challenges his fine on three grounds: (1) that the district court imposed a sentence that was excessive because it was eight times the maximum guideline amount; (2) that the district court improperly considered Defendant's financial resources in assessing the fine; and (3) that the fine was disproportionate in violation of the Eighth Amendment.

1. Preservation and Standard of Review

This Court reviews the district court's imposition of a fine as a part of a defendant's sentence for abuse of discretion. *See United States v. Gibson,* 409 F.3d 325, 342 (6th Cir. 2005) (citation omitted). Where Defendant fails to preserve a challenge to a fine, however, it is reviewed for plain error. *United States v. Bostic,* 371 F.3d at 873. "To establish plain error, a defendant must show (1) that an error occurred in the district court; (2) that the error was plain, *i.e.,* obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Abboud,* 438 F.3d at 583.

In this case, Defendant preserved his challenges to the district court's assessment of a fine outside the guideline range by objecting to the government's recommended fine of $908,000 (based on amount of loss) in the Pre-Sentence Report, and objecting to an upward departure at the sentencing hearing. Defendant has not, however, preserved his Eighth Amendment challenge to the fine or his challenge premised on the district court's allegedly improper consideration of his financial resources in assessing the fine. Accordingly, we review Defendant's challenge to the district court's assessment of a fine outside the guideline range for abuse of discretion and Defendant's remaining challenges for plain error and find no abuse of discretion or plain error.

2. The District Court Did Not Abuse Its Discretion or Commit Plain Error

The district court did not abuse its discretion or commit plain error in imposing a $1,000,000 dollar fine on Defendant. The comments to the Sentencing Guidelines indicate that an upward departure may be warranted where two times the amount of loss resulting from the offense exceeds the maximum guideline fine. U.S. Sentencing Guidelines Manual § 5E1.2, comment 4 (2006). In this case, the district court determined that the resulting loss was approximately $908,000. Inasmuch as twice $908,000 equals $1,816,000 and $1,816,000 exceeds the maximum recommended fine ($125,000), the district court did not abuse its discretion in departing upward. Moreover, the amount the district court departed upward was perfectly reasonable. It accounted for the estimated loss resulting from Defendant's conduct. Next, 18 U.S.C. § 3572(a) permits a district court to consider a defendant's financial

resources in assessing fines. Therefore, the district court committed no error, let alone plain error, in considering Defendant's ability to pay. Finally, the $1,000,000 dollar fine is not excessive in violation of the Eighth Amendment. A punitive fine violates the Eighth Amendment's "*Excessive Fines Clause* if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian,* 524 U.S. 321, 334 (1998). The fine in this case is not disproportionate to the gravity of the offense inasmuch as it is equal to the loss caused by the offense. Therefore, the district court did not commit plain error in imposing it. Accordingly, we affirm the district court's imposition of the fine.

J. Term of Supervised Release

1. Preservation and Standard of Review

Defendant failed to preserve this issue for review by objecting to its imposition at sentencing. Therefore this Court reviews for plain error. *United States v. Kingsley,* 241 F.3d 828, 836 (6th Cir. 2001).

2. The Imposition of the Term Was Not Plain Error

Defendant has not established that the district court's imposition of a special condition prohibiting Defendant from "profit[ting] in any way from the production of books, movies, or any other media products that may occur as a result of his involvement in the instant offense" for the duration of his supervised release was plain error. Assuming, without deciding, that the imposition of the term in this case constituted error, we do not find that the error was "plain" or obvious. Although this Circuit has not

directly spoken on this issue, at least one Circuit has upheld the imposition of an identical provision. *United States v. Terrigno,* 838 F.2d 371, 374 (9th Cir. 1988). At a minimum, the Ninth Circuit's decision indicates that reasonable minds could differ as to the legality of the disputed condition, and any error was therefore not "plain." We therefore affirm the district court's imposition of the disputed term.

K. Amount of Loss Calculation

1. Standard of Review

We review the district court's calculation for clear error, *United States v. Guthrie,* 144 F.3d 1006, 1011 (6th Cir. 1998). Finding no clear error, we affirm the district court's amount of loss determination.

2. The Amount of Loss Calculation Was Not Clearly Erroneous.

The district court's determination that the loss amount caused by Defendant's conduct was $908,853.02 was not clearly erroneous. The sole basis for Defendant's contention that $908,853.02 constitutes a clearly erroneous amount is that it includes loss amounts attributable to persons acquitted of insider trading, Voss and Jack, and persons not named in the indictment. First, the district court was not prohibited from including amounts attributable to the trading of Voss and Jack simply because they were acquitted. The acquittal simply means the jury did not find that Voss and Jack committed insider trading beyond a reasonable doubt. The district court in this case, however, only needed to determine the amount of loss by a preponderance of the evidence. *See*

United States v. Davidson, 409 F.3d 304, 310 (6th Cir. 2005) (holding that the same evidentiary standards apply post-*Booker*); *United States v. Rothwell,* 387 F.3d 579, 582 (6th Cir. 2004) (holding that the district court determines the amount of loss under the preponderance of the evidence standard). Accordingly, the district court's inclusion of the amount attributable to Voss' and Jack's trading is not clear error. Second, the district court is not prohibited from considering facts not included in the indictment. *See United States v. Booker,* 543 U.S. 220, 249-255 (2005). Thus, it did not commit clear error simply because it included loss amounts attributable to the trading of persons not named in the indictment. Therefore, we affirm the district court's amount of loss calculation.

L. Section 3553 Analysis

Finally, Defendant asks this Court to vacate his 72 month sentence and remand for resentencing on the ground that the district court failed to consider all the relevant § 3553 factors. Specifically, Defendant contends that the district court failed to consider the following factors despite Defendant's submission of a sentencing brief, arguing that the factors constituted grounds for a lower sentence: (1) Defendant's personal history; (2) the lack of any need to protect the public; (3) the lack of any need to deter Defendant; and (4) the allegation that Defendant did not commit his crime for personal monetary gain. For the reasons set forth below, we affirm the imposition of a 72 month period of incarceration.

1. Preservation and Standard of Review

We review Defendant's claim for plain error because Defendant failed to object to the district court's § 3553 analysis at the sentencing hearing, despite the fact that the district court provided Defendant with the opportunity to object. *United States v. Bostic,* 371 F.3d 865, 873 (6th Cir. 2004). "To establish plain error, a defendant must show (1) that an error occurred in the district court; (2) that the error was plain, *i.e.,* obvious or clear; (3) that the error affected defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Abboud,* 438 F.3d at 583.

2. The District Court Did Not Commit Plain Error

The job of the district court is to impose "'a sentence sufficient, but not greater than necessary, to comply with the purposes' of section 3553(a)." *Foreman,* 436 F.3d 63, 640 (6th Cir. 2006) (quoting 18 U.S.C. § 3553). In reaching a sentence that complies with the purposes of § 3553(a), the district court must consider the Sentencing Guidelines range and all relevant § 3553 factors. *Id.* While a district court need not explicitly reference § 3553 or recite a list of factors, it must provide a reasoned explanation for its choice of sentence and its explanation must be sufficiently thorough to permit meaningful appellate review. *Id.* Additionally, "[w]here a defendant raises a particular argument in seeking a lower sentence, the record must both reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." *United States v. Vonner,* ___ F.3d ___,

2006 WL 1770095, at * 6 (6th Cir. 2006); *United States v. Richardson,* 437 F.3d 550, 554 (6th Cir. 2006).

This Court will only uphold a sentence if it is reasonable. Reasonableness contains two facets: substantive and procedural. *See United States v. Webb,* 403 F.3d 373, 383 (6th Cir. 2005); *United States v. Jones,* 445 F.3d 865 (6th Cir. 2006) (Moore, J., dissenting on the ground that the majority opinion conflicted with prior Circuit precedent). In reviewing for reasonableness, this Court employs a presumption of substantive reasonableness. *United States v. Williams,* 436 F.3d 706, 708 (2006) (holding presumption of reasonableness exists, but still noting that a district court must consider the § 3553 factors). That is, this Court presumes that the district court imposed a sentence of the appropriate length. However, this Court will not presume that a district court employed the proper procedures – a reasoned consideration of all relevant § 3553 factors – in reaching it sentence. *Webb,* 403 F.3d at 383; *Foreman,* 436 F.3d at 644. In other words, the presumption of reasonableness does not "mean that a guidelines sentence will be found reasonable in the absence of evidence in the record that the district court considered all of the relevant section 3553(a) factors." *Id.*

In this case, the district court did not commit plain error in sentencing Defendant to 72 months incarceration. First, contrary to Defendant's contentions, the district court did consider Defendant's personal history, the lack of any need to protect the public, and the lack of any need to deter Defendant from committing insider trading in the future. The district court explicitly considered Defendant's personal history, but simply found that it did not warrant a lighter sentence. The court explained:

> [Defendant] was not only a noted expert in his field, but also a gifted teacher, and was revered by his students, many of whom have modeled their careers after his own and have taken his advice and counsel as valuable tools to be used by them in the conduct of their own careers, and by engaging this illegal activity, and engaging in the obstruction of justice to cover it up, he has tainted forever his credibility. And one wonders just what effect that's going to have on the many students who have placed their trust and confidence in his counsel and advice. This is indeed an unfortunate consequence of his offense conduct.

(J.A. at 3947.) Thereafter, the district court expressly recognized that there was no need to deter Defendant or protect the public from Defendant but that a need did exist to deter others from committing similar crimes. The court stated:

> The need for the sentence in this case to afford adequate deterrence, and it is not deterrence of Professor Blackwell, I doubt he will ever again engage in activities of this kind, or indeed have the opportunity to do so, but it's to deter other similarly situated from engaging in this kind of conduct that's a primary sentencing factor.

(J.A. at 3949.) Additionally, the court recognized that this was a serious offense that did indeed have victims, including Defendant's friends and family, holders of WF stock who sold to insiders, and Ohio State University. Inasmuch as future crimes by others would also presumably have victims, the court clearly believed there was a need to protect the public or at least our economic and justice systems. (J.A. at 3946, 3949 "[Defendant's] offense strikes

at the heart of the integrity of a main part of the free enterprise system." and "[Defendant's obstruction of justice] seriously undermine[d] respect for the system of justice.")

Next, although the district court failed to consider Defendant's contention that he did not commit his crimes for personal monetary gain in imposing 72 months of incarceration, we cannot say that this failure constituted plain error. To establish plain error, Defendant must show not only that an obvious error occurred, but also that the error affected the integrity of the judicial proceedings. *Abboud,* 438 F.3d at 583. The district court's failure to consider Defendant's contention that he did not commit his crimes for personal monetary gain in imposing 72 months of incarceration was an obvious error inasmuch as the black letter law of this Circuit requires district courts to consider all factors brought to their attention by a defendant. *Vonner,* ___ F.3d ___, 2006 WL 1770095, at *6; *Richardson,* 437 F.3d at 554. Furthermore, we do not believe that this error was remedied by the district court's consideration of Defendant's lack of financial motivation in calculating the advisory guidelines and in assessing Defendant's fine. Consideration of Defendant's motive in calculating the guidelines range or in assessing the fine is not an adequate substitute for consideration of Defendant's motive in assessing the proper period of incarceration. If considering Defendant's motive in assessing the guidelines range were an adequate substitute for considering Defendant's motive in determining the proper period of incarceration, the guidelines would become de facto mandatory. Additionally, Defendant's financial motives may bear differently on the proper fine than the length of incarceration. Most importantly, however, in arguing that

his non-financial motive was relevant to the § 3553 analysis, Defendant was arguing not only that he receive a lighter fine, but also that *his incarceration be shorter,* and this argument was never considered by the district court.

This error, however, did not affect the fairness, integrity or public reputation of the judicial proceedings. The trial court's error was procedural, not substantive. Importantly, the district court reached a substantively reasonable sentence by thoroughly and thoughtfully considering Defendant's personal history and the nature of Defendant's illegal actions. While the district court skipped a procedural step in reaching the sentence in question, in the circumstances of this case, that misstep did not affect the outcome. Therefore, we affirm the district court's imposition of 72 months of incarceration.

III.

CONCLUSION

For the foregoing reasons, we **AFFIRM** Defendant's convictions and sentence.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

V.

Roger D. Blackwell

JUDGMENT IN A CRIMINAL CASE

(Filed 12/15/2005)

CASE NUMBER:
2:04-cr-134-1

William Wilkinson, Esq.
DEFENDANT'S ATTORNEY

The defendant was convicted on counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 23, 46, 47 and 48 of the indictment.

The defendant is adjudicated guilty of these offenses:

TITLE AND SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 USC 371	Conspiracy to Insider Trading	11/29/1999	1 and 23
5 USC 78j and ff	Insider Trading	10/31/1999	2-15
18 USC 1001	False Statements	1/9/2001 1/18/2002	46 48
18 USC 1505	Obstruction of an Agency Proceeding	11/8/2000	47

The defendant is sentenced as provided in pages 2 through of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on counts 16, 17, 18, 19, 20, 21, 22, and 45

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

December 15, 2005
Date of Imposition of Judgment

s/James L. Graham

JAMES L. GRAHAM U.S. DISTRICT JUDGE
Name of Judge Title of Judge

December 15, 2005
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **sixty (60) months on counts 1, 23, 46, 47, 48 and seventy-two (72) months on counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15. All sentences to run concurrently.**

[X] The Court makes the following recommendation to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

before 2 p.m. no sooner than thirty (30) days from this date.

[X] The defendant be assigned to the FCI in Morgantown, West Virginia.

RETURN

I have executed this Judgment as follows:

Defendant delivered on ___ to ___ at ___, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy US Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years on each of counts 1, 2-15, 23, 46-48 to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and

at least two periodic drug tests thereafter, as determined by the court.

[X] The defendant shall not possess a firearm, ammunition, destructive device, of any other dangerous weapon. (Check if applicable)

[X] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable)

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court.

The defendant shall also comply with any additional conditions set forth below:

The defendant shall participate in substance abuse treatment as directed by the probation officer.

The defendant shall participate in mental health treatment as directed by the probation officer.

The defendant shall permit the probation officer access to any requested financial information.

The defendant shall no profit in any way from the production of books, movies, or any other media products that may occur as a result of his involvement in the instant offense.

STANDARD CONDITIONS OF SUPERVISION

1. THE DEFENDANT SHALL NOT LEAVE THE JUDICIAL DISTRICT WITHOUT THE PERMISSION OF THE COURT OR THE PROBATION OFFICER;

2. THE DEFENDANT SHALL REPORT TO THE PROBATION OFFICER AND SHALL SUBMIT A TRUTHFUL AND COMPLETE WRITTEN REPORT WITHIN THE FIRST FIVE DAYS OF EACH MONTH;

3. THE DEFENDANT SHALL ANSWER TRUTHFULLY ALL INQUIRIES BY THE PROBATION OFFICER AND FOLLOW THE INSTRUCTIONS OF THE PROBATION OFFICER;

4. THE DEFENDANT SHALL SUPPORT HIS OR HER DEPENDENTS AND MEET OTHER FAMILY RESPONSIBILITIES;

5. THE DEFENDANT SHALL WORK REGULARLY AT A LAWFUL OCCUPATION UNLESS EXCUSED BY THE PROBATION OFFICER FOR SCHOOLING, TRAINING, OR OTHER ACCEPTABLE REASONS;

6. THE DEFENDANT SHALL NOTIFY THE PROBATION OFFICER WITHIN 72 HOURS OF ANY CHANGE IN RESIDENCE OR EMPLOYMENT;

7. THE DEFENDANT SHALL REFRAIN FROM EXCESSIVE USE OF ALCOHOL

8. THE DEFENDANT SHALL NOT FREQUENT PLACES WHERE CONTROLLED SUBSTANCES ARE ILLEGALLY SOLD, USED, DISTRIBUTED, OR ADMINISTERED;

9. THE DEFENDANT SHALL NOT ASSOCIATE WITH ANY PERSONS ENGAGED IN CRIMINAL ACTIVITY AND SHALL NOT ASSOCIATE WITH ANY

PERSON CONVICTED OF A FELONY UNLESS GRANTED PERMISSION TO DO SO BY THE PROBATION OFFICER;

10. THE DEFENDANT SHALL PERMIT A PROBATION OFFICER TO VISIT HIM OR HER AT ANY TIME AT HOME OR ELSEWHERE AND SHALL PERMIT CONFISCATION OF ANY CONTRABAND OBSERVED IN PLAIN VIEW BY THE PROBATION OFFICER;

11. THE DEFENDANT SHALL NOTIFY THE PROBATION OFFICER WITHIN SEVENTY-TWO HOURS OF BEING ARRESTED OR QUESTIONED BY A LAW ENFORCEMENT OFFICER;

12. THE DEFENDANT SHALL NOT ENTER INTO ANY AGREEMENT TO ACT AS AN INFORMER OR A SPECIAL AGENT OF A LAW ENFORCEMENT AGENCY WITHOUT THE PERMISSION OF THE COURT;

13. AS DIRECTED BY THE PROBATION OFFICER, THE DEFENDANT SHALL NOTIFY THIRD PARTIES OF RISKS THAT MAY BE OCCASIONED BY THE DEFENDANT'S CRIMINAL RECORD OR PERSONAL HISTORY OR CHARACTERISTICS, AND SHALL PERMIT THE PROBATION OFFICER TO MAKE SUCH NOTIFICATIONS AND TO CONFIRM THE DEFENDANT'S COMPLIANCE.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals	$1,900.00	$1,000,000.00	$

[ ] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 USC 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 USC 3612(g).

[X] The court determined that the defendant does not have the ability to pay interest and it is ordered that the interest is waived for the fine

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [X] Lump sum payment of the special assessment of $1,900.00 and the fine of $1,000,000.00 is due immediately.

B [ ] Payment to begin immediately (may be combined with C/D/F below); or

C [ ] Payment in equal weekly, monthly, quarterly installments of $ over a period of months/years, to commence thirty (30)/sixty (60) days after the date of this judgment; or

D [ ] Payment in equal weekly, monthly, quarterly installments of $ over a period of months/years, to commence thirty (30)/sixty(60) days after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within thirty(30)/sixty(60) days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instruction regarding the payment of criminal penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the United States District Court, Office of the Clerk, 85 Marconi Blvd., Room 260, Columbus, Ohio 43215.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

2005 WL 3440880

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America

v. Case No. 2:04-cr-134

Roger D. Blackwell, et al.

OPINION AND ORDER

(Filed Dec. 14, 2005)

This matter is before the court on defendant Blackwell's motion pursuant to Fed.R.Crim.P. 33 for a new trial based on newly discovered evidence. Defendants Hughes and Stacy have moved to adopt the motion filed by defendant Blackwell. (Docs. # 208 and 209). The motions to adopt are granted.

Defendant Blackwell's motion refers to an article which appeared in the December 2005 issue of *Columbus Monthly*. That article states that a juror in defendants' trial sent an e-mail to the magazine, stating, "Mr. Blackwell lied under oath on the witness stand" and "I am still at a loss when I try to understand what the motivation was behind Mr. Blackwell's actions." *See Motion*, Exhibit A. The article goes on to state that in a subsequent telephone interview, the juror related that three jury members saw Blackwell mouth "I hate you" to Tina Stephan, his ex-wife, while she was on the witness stand. Defendant Blackwell subsequently took the stand and denied doing so. According to the juror, when the jury members began discussing Blackwell's denial during deliberation, "his fate was virtually sealed from my perspective." The juror further stated that the jury found the testimony and

evidence to be "pretty straightforward" and that they took two and a half days to reach a verdict because they "wanted to make sure to examine everything." The juror also indicated that she and the other members of the jury "found Jack Kahl's testimony compelling." The juror concluded by stating, "It just seems amazing that somebody so well educated and familiar with the workings of the world would do something like this."

Defendant Blackwell now argues that the jury's reliance on the alleged lip reading by members of the jury resulted in his being convicted on the basis of evidence not in the record in violation of his Fifth Amendment rights. He further argues that the government should not have been permitted to cross-examine him concerning the incident because it did not constitute intimidation and because the government introduced no other evidence concerning the incident. He also contends that the government's cross-examination violated his Sixth Amendment right to confront witnesses.

A district court has discretion when deciding whether to grant or deny a motion for a new trial under Rule 33. A defendant requesting a new trial on the basis of newly discovered evidence must demonstrate the following:

> (1) the evidence was discovered after the trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal.

United States v. Glover, 21 F.3d 133, 138 (6th Cir. 1994) (quoting *United States v. O'Dell*, 805 F.2d 637, 640 (6th

Cir. 1986)). Motions for a new trial based on newly discovered evidence are "disfavored." *Id.*

The arguments about the propriety of the government's cross-examination of defendant Blackwell about his alleged actions and the confrontation argument are not newly discovered evidence. The alleged statement by defendant Blackwell was mentioned by counsel for the government during the trial. *See* Transcript, pp. 478-480. Government counsel argued that defendant's actions of looking at Ms. Stephan with "a mean face" and stating "I hate you" tended to intimidate the witness and make the witness reluctant to testify. Transcript, p. 479. The court indicated, "I did not witness such behavior on the part of Mr. Blackwell, but it was reported to me." The court then advised counsel for all parties that it was improper to attempt to intimidate a witness by facial expressions or any other manner or gesture, and that the court would issue a contempt order if it occurred again. Transcript., p. 479. Government counsel then stated that the alleged incident occurred while counsel and the court were at a sidebar conference, and that he was unaware it had occurred until it was brought to his attention at the end of the day. Transcript, p. 480. The court responded, "If you want to pursue it further, I'll be happy to hear evidence about it and do whatever is necessary. So I'll let you consider whether you want to do that." The court further indicated that if the government wished to invoke the court's assistance in regard to this matter, the court would schedule time outside of the trial to hear more about it. Transcript, p. 480.

The cross-examination of defendant Blackwell also occurred during the trial. Prior to proceeding with this line of inquiry, government counsel asked for a sidebar

conference and indicated that he intended to cross-examine defendant Blackwell about the reported incident. Transcript, p. 3516. Defense counsel argued that the inquiry was based on speculation. However, the court stated,

> I think there is a factual basis for the questions. It was reported to me that gestures, facial expressions, and mumbling of some words – and I think there was obviously a change in the positioning of the witness [meaning the defendant] in the courtroom by his counsel after this was reported. So there is a factual basis, I believe, and you can ask him.

Transcript, p. 3517.

Counsel then entered their objections to the line of questioning. Transcript, p. 3518. Counsel for defendant Blackwell objected, noting that the court gave the government an earlier opportunity to proffer the information into the record and they did not do so. The court stated,

> Anything that bears upon this witness's credibility is proper, and if he made improper gestures in the courtroom or tried to intimidate the witness, he can be asked about that. I don't know what he's going to say, but I think there's a sufficient basis for the question. It was reported to me by numerous people in the courtroom that this is what happened, so. . . .

Transcript, p. 3519. Defense counsel sought no further clarification from the court concerning the source of the court's information. They also never asked the court to compel the government to reveal its source for the information so that they could question the government's source or call this person as a witness.

The government asked defendant Blackwell whether he tried to intimidate his ex-wife during her direct examination, and he stated, "No, I didn't try to intimidate her." Transcript, p. 3519. He denied that he attempted to bully and intimidate his ex-wife during a sidebar conference in an effort to keep her from telling the truth. He also denied mouthing the words "I hate you" to his ex-wife. Transcript, p. 3520. He acknowledged that he might have glared at her at some times. Transcript, p. 3521. The government presented no other testimony concerning the incident. The defendants presented no witnesses on this point.

Defendants' arguments concerning the propriety of the cross-examination and the alleged denial of-confrontation of witnesses are amplifications of the objections which were made during the trial. They concern matters which arose and were addressed during the trial. As such, they are not grounds for a new trial based on newly discovered evidence. These arguments were not included in defendants' previous motion for a new trial, and they are not timely made under Fed.R.Crim.P. 33(b)(2) (motions for a new trial based on grounds other than newly discovered evidence must be filed within seven days after the verdict). Therefore, defendants' motions for a new trial on these grounds are denied. However, since the defendants objected to the government's cross-examination at trial, the court will explain its reasoning for permitting the cross-examination.

It is well established that threats made against government witnesses constitute evidence of spoliation. *See United States v. Fortson*, 194 F.3d 730, 737 (6th Cir. 1999) (evidence that defendant threatened a witness is generally admissible because it is probative of consciousness of guilt.) "It is reasoned that threats against a

witness constitute an effort by the defendant to tamper with the substance of the government's case, and thus are probative of a defendant's awareness that the government is likely to prevail at trial." *United States v. Copeland*, 321 F.3d 582, 597 (6th Cir. 2003). "The fact that defendant attempted to . . . threaten an adverse witness indicates his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit." *United States v. Mendez-Ortiz*, 810 F.2d 76, 79 (6th Cir. 1986) (quoting II Wigmore EVIDENCE, § 278 (Chadbourn rev. 1979)). Further, because spoliation evidence tends to establish consciousness of guilt without any inference as to the character of the spoliator, its admission does not violate Fed.R.Evid. 404(b). *Id.*

In allowing threat evidence, courts have applied the same standard to threats occurring inside and outside the courtroom. *United States v. Gatto*, 995 F.2d 449, 454 (3d Cir. 1993). *See Gatto*, 995 F.2d at 454-55 (testimony of prosecution witness concerning defendant looking at him during trial held proper, noting that it was for the jury to decide whether defendant's conduct revealed his state of mind); *United States v. Maddox*, 944 F.2d 1223, 1230 (6th Cir. 1991) (government witness properly permitted to testify that defendant mouthed the words "you're dead" to her while she was on the stand); *United States v. Mickens*, 926 F.2d 1323 (2d Cir. 1991) (permitting prosecution witness to testify that defendant made a hand gesture in the shape of a gun when the witness entered the courtroom. The words "I hate you" could reasonably be considered as an attempt to intimidate the witness or influence her testimony.

It is also proper for the government to cross-examine the defendant concerning alleged threats to a witness. *United States v. Alberti*, 470 F.2d 878, 882 (2d Cir. 1973). It is not proper for the government to attempt to create an impermissible suggestion of threats where no basis exists for asking the questions, and the government, if confronted with a demand for an offer of proof, must provide some good faith basis for questioning the defendant. *See United States v. Rodney*, 999 F.2d 541 (table), 1993 WL 280328 (6th Cir. July 26, 1993).

In this case, the court indicated on the record that it was satisfied that the government had a sufficient factual basis, as the court had received reports concerning the alleged incident. Defense counsel never requested additional information concerning the court's reasoning. The court now wishes to clarify for the record that the court did not receive any communications from any of the jurors in this case concerning this matter. The court received information from a reliable member of the court's staff, who was in a position to observe defendant Blackwell at the time, who reported observing defendant Blackwell mouth the words "I hate you" to Ms. Stephan while she was on the stand.

The government's cross-examination of defendant Blackwell in regard to this incident was proper and had an adequate basis in fact. Defendants' argument that the government had no factual basis for its questions and was simply trying to improperly raise an adverse inference through its questions is not well taken. Defendant argues that, even assuming the statement was made, there are other ways besides consciousness of guilt to construe the statement. Defendant Blackwell could have admitted making the statement (if he in fact made it) and could

have then offered some explanation for making the statement, including a denial of any intent to intimidate the witness. Instead, he denied making the statement. Defendants' arguments that the jury was invited to draw the adverse inference solely from the government's questions are not well founded. This court instructed the jury in its charge at the conclusion of the case that the questions of counsel are not evidence. As a general rule, jurors are presumed to follow cautionary instructions. *United States v. Tines*, 70 F.3d 891 (6th Cir. 1995); *United States v. Sivils*, 960 F.2d 587 (6th Cir. 1992).

The government did not act improperly in asking defendant Blackwell about the incident rather than calling other persons to testify about it. Defendant Blackwell, as the alleged maker of the statement, was the person in the best position to know whether it had been made. Defendant denied making the statement under oath. Any argument that he may have testified differently if his counsel had received more information concerning the strength of the government's proof on the issue is insufficient to show a denial of his constitutional rights. If the defense wished to call additional witnesses on this point, defense counsel could have asked the court or the government to identify the source of the information, and could have called this person or persons as witnesses upon cross-examination. The defense did not do so, and, in light of defendant Blackwell's denial of the incident, it is difficult to imagine how calling witnesses to contradict his testimony would have furthered the defense. The fact that the government did not call other witnesses did not deprive the defendants of the right to confront witnesses.

In this case, the only matter which constitutes newly discovered evidence is the *Columbus Monthly* article

containing the statements of the juror concerning the jury deliberations, including the revelation that three jurors allegedly indicated during deliberations that they observed defendant Blackwell mouth the words "I hate you" to his ex-wife. These statements fall within the scope of Fed.R.Evid. 606 (b), which states:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

This rule is a codification of the general common law rule that a juror is incompetent to impeach his or her verdict. *United States v. Gonzales*, 227 F.3d 520, 524 (6th Cir. 2000). As noted by the Supreme Court in *Tanner v. United States*, 483 U.S. 107, 127 (1987), "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." These concerns include the need for finality to litigation, the need to protect jurors from harassment after a verdict is rendered, and the need to prevent the possible exploitation of disgruntled ex-jurors. *Gonzales*, 227 F.3d at 527. The only two

exceptions to the rule occur when extraneous prejudicial information is improperly brought to the jury's attention, and when outside influence was improperly brought to bear upon any juror.

An extraneous influence on a juror is "one derived from specific knowledge about or a relationship with either the parties or their witnesses." *United States v. Herndon*, 156 F.3d 629, 636 (6th Cir. 1998) (holding that juror's recollection that he might have had previous business dealings with defendant constituted an extraneous influence). Extraneous influence has been found to exist in the case of: (1) statements made to the jury by a bailiff, *Parker v. Gladden*, 385 U.S. 363 (1966); (2) a juror's contact with a party during trial, *Washington Gas Light Co. v. Connolly*, 214 F.2d 254 (D.C.Cir. 1954); (3) a juror in a criminal trial who had previously applied for a job in the district attorney's office, *Smith v. Phillips*, 455 U.S. 209 (1982); (4) a juror's contact with someone who suggested that the juror could profit by bringing in a verdict for the defendant; *Remmer v. United States*, 347 U.S. 227 (1954); and the jury's exposure to newspaper articles and media attention, *United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972).

Sixth Circuit cases involving extraneous influences include: *United States v. Rugiero*, 20 F.3d 1387 (6th Cir. 1994) (jurors became aware during deliberations of television broadcast linking defense counsel to organized crime); *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988) (spectator at trial made comments in presence of jurors on courthouse elevator that jurors considered threatening); *United States v. Ramos*, 861 F.2d 461 (6th Cir. 1988) (wife of juror seen embracing wife of one of the defendants and conversing with defendant and his wife in witness room);

United States v. Pennell, 737 F.2d 521 (6th Cir. 1984) (five jurors contacted at home during deliberations by anonymous telephone caller who made threatening statements).

An "outside influence" refers to a factor originating outside of normal courtroom proceedings which influences jury deliberations, such as a statement made by a bailiff to the jury or a threat against a juror. *United States v. Jones*, 132 F.3d 232, 245 (5th Cir. 1998) (citing Fed.R.Evid. 606 (b) Advisory Committee Note and Judiciary Committee Note).

Internal influences include such matters as the pressure of one juror on another, juror misunderstanding of court instructions, a verdict achieved through compromise, juror misgivings about the verdict, and juror agreement on a time limit for a decision. *United States v. Logan*, 250 F.3d 350, 380-381 (6th Cir. 2001) (holding that alleged misconduct consisting of potentially premature deliberations that occurred during the course of the trial constituted a potential internal influence).

In *Tanner*, 483 U.S. at 118, the Supreme Court provided examples of internal influences, including the behavior of jurors during deliberations, the jurors' ability to hear or comprehend trial testimony, and "physical or mental incompetence of a juror." The Court noted that the "internal processes of the jury" generally constitute internal influences." *Id.* at 120. Examples of matters which have been found to be strictly within the deliberative process include: (1) evidence of juror intoxication, *Tanner*, 483 at 125; (2) statements of juror about the deliberations and her feelings, including fact that she did not think that defendant was totally guilty, *Gonzales*, 227 F.3d at 525-26; and the jury's misunderstanding of the court's jury

instructions, *United States v. Tines*, 70 F.3d 891, 898 (6th Cir. 1995).

In this case, most of the juror's statements quoted in the *Columbus Monthly* article concern the deliberations of the jurors and their thought processes, and thus they cannot be considered under Rule 606 (b). The only issue presented is whether the report that three jurors observed defendant Blackwell mouth the words "I hate you" while Ms. Stephan was on the stand constitutes an internal influence, as opposed to extraneous prejudicial information improperly brought to the jury's attention, or an outside influence.

In *Remmer*, the Supreme Court held that a trial court, when confronted with an allegation of "any private communication, contact, or tampering, directly or indirectly, with a juror during trial," must hold a hearing to determine the circumstances, the impact of the contact upon the juror, and whether or not the contact was prejudicial. *Remmer*, 347 U.S. at 229. The Sixth Circuit has held that a *Remmer* hearing is required "in all cases involving an unauthorized communication with a juror or the jury from an outside source that presents a likelihood of affecting the verdict." *United States v. Rigsby*, 45 F.3d 120, 123 (6th Cir. 1995). A *Remmer* hearing is not warranted every time a juror suggests that the jury heard impermissible extraneous information during deliberations. *Gonzales*, 227 F.3d at 527. Rather, a hearing is required only when there is a colorable claim of extraneous information that presents a likelihood of affecting the verdict. *Id.*

Further, the need for a *Remmer* hearing does not arise absent the existence of an outside influence on a juror. *United States v. Frost*, 125 F.3d 346, 377 (6th Cir. 1997).

See Rigsby, 45 F.3d at 125 (finding no external contact with juror warranting hearing where juror told a court functionary that she thought she knew some of the witnesses and asked if this would present a problem); *United States v. Griffith*, 17 F.3d 865 (6th Cir. 1994) (trial court properly declined to hold hearing because fact that alternate juror who was excused when deliberations began had attempted to discuss case with deputy marshal was found to be internal and within strictures of Rule 606 (b)); *United States v. Shackelford*, 777 F.2d 1141, 1145 (6th Cir. 1985) (upholding trial court's refusal to conduct *Remmer* hearing where defendant failed to establish that any extraneous influences had been brought to bear on jury, even though a juror had talked with his wife during break in deliberations).

At the *Remmer* hearing, the defendant must show that an unauthorized contact created actual juror bias, and courts may not presume that a contact was prejudicial. *Id.*; *United States v. Branham*, 97 F.3d 835, 855 (6th Cir. 1996) ("The burden rests on the defendants to demonstrate that the alleged juror misconduct prejudiced their defense, and under no circumstance will prejudice be presumed.").

Before they are entitled to a hearing, defendants must present a colorable claim that an external influence occurred. Here, defendant Blackwell denied under oath at trial that the alleged activity occurred. If he testified truthfully, then the most that can be established by the evidence is that the jurors were mistaken in their observations. This would relate to the jurors' own internal mental process, a topic which is shielded from inquiry by Rule 606 (b). *See United States v. Vig*, 167 F.3d 443, 450 (8th Cir.

1999) (juror's comments reflecting a misapprehension of the evidence presented was not proper subject of inquiry).

If in fact defendant Blackwell did mouth the statement to his wife during trial, this would not constitute an external or extraneous influence, because it happened in open court and was within the scope of, and addressed by, the judicial process. In *United States v. Rodriguez*, 116 F.3d 1225 (8th Cir. 1997), the defendant raised as error the fact that the defendant's failure to testify was discussed during deliberations. The defendant argued that since his failure to testify was not evidence and should not have been considered, it should be considered an "outside influence" about which the jurors should be allowed to testify. *Id.* at 1226-27. The court rejected this argument, noting:

> That Rodriquez did not testify is not a fact the jurors learned through outside contact, communication, or publicity. It did not enter the jury room through an external, prohibited route. It was part of the trial, and was part of the information each juror collected. It should not have been discussed by the jury, and indeed was the subject of a jury instruction to that effect. But it was not "extraneous information," and therefore does not fall within the exception outlined in Rule 606 (b).

Id. at 1227. *See also United States v. Rutherford*, 371 F.3d 634, 640 (9th Cir. 2004) (jurors could not testify about their discussion of defendant's failure to testify because they learned of defendant's failure to testify through their personal observations during trial, not through a prohibited route or improper *ex parte* contact); *United States v. Tran*, 122 F.3d 670, 672 (8th Cir. 1997) (defendant's failure

to testify not extraneous information because "it was known to the jurors as a result of their presence at the trial, not as a result of something disclosed to them that had not occurred in the courtroom."); *United States v. Falsia*, 724 F.2d 1339 (9th Cir. 1983) (jurors' statements that they had discussed the absence of a co-defendant and his failure to testify during deliberations held inadmissible under Rule 606 (b) because the jurors had learned this information through observation during trial).

In *United States v. Reesor*, 10 Fed. Appx. 297, 2001 WL 523931 (6th Cir. May 7, 2001), the court held that the district court properly denied a new trial based on evidence that jurors witnessed the fraud defendant disputing his lunch bill in the court cafeteria. The court noted that the extrinsic influences involved were generated by the defendant himself. 10 Fed.Appx. at 305. The court further stated, "To require a mistrial or even a *Remmer* hearing on the basis of actions taken by the defendant would obviously create a serious potential for mischief. Tanner gives no contrary authority supporting a jury influence claim based on the defendant's own misbehavior during trial, whether in or out of the courtroom." *Id.*

The information at issue here was information which the jurors allegedly learned as a result of their own observations in open court. The defendant testified concerning the issue during his cross-examination. When the defendant took the stand, he placed his credibility at issue, and the jury was entitled to consider his demeanor in the courtroom in weighing his credibility. *See Allen v. Woodford*, 395 F.3d 979, 997 (9th Cir. 2005) (holding that prosecutor's comments regarding petitioner's demeanor were permissible because he chose to testify); *United States v. Schuler*, 813 F.2d 978, 981 n. 3 (9th Cir. 1987)

("When a defendant chooses to testify, a jury must necessarily consider the credibility of the defendant. In this circumstance, courtroom demeanor has been allowed as one factor to be taken into consideration."). If, in fact, some of the jurors observed defendant Blackwell mouth the phrase "I hate you" to his wife, and later heard him deny it on the stand, this was internal information learned during the course of the trial which the jurors were entitled to consider. Thus, any further inquiry into the matter is barred by Rule 606 (b), and defendants are not entitled to a *Remmer* hearing.

Finally, in regard to the motions for a new trial filed by defendants Hughes and Stacy on this issue, the court notes that the evidence in question bears on the credibility of defendant Blackwell, not on the credibility of the other defendants. Thus, defendants Hughes and Stacy have not shown how this information could have had any influence on the jury's verdict in their cases. To the extent that they would argue that the evidence had some carry-over effect, the court notes that co-defendants Voss and Jack were acquitted on the strength of their testimony. There is no indication that the jury did not follow this court's instructions to independently evaluate the case against each defendant in deciding the charges against defendants Hughes and Stacy.

For the foregoing reasons, defendants' motions for a new trial based on newly discovered evidence are denied.

Date: December 14, 2005 /s/ James L. Graham
James L. Graham
United States District Judge

[461] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	
PLAINTIFF,	:	
VS.	:	CASE NO. CR 2-04-134
ROGER D. BLACKWELL, et al.,	:	
DEFENDANTS.	:	

PROCEEDINGS

BEFORE THE HONORABLE JAMES L. GRAHAM, UNITED STATES DISTRICT JUDGE, SITTING AT COLUMBUS, OHIO, ON MAY 19, 2005.

VOLUME III

* * *

[478] MR. MAROUS: Your Honor, I'm sorry, an unrelated matter.

THE COURT: Yes.

MR. MAROUS: We had yesterday what the government would submit were violations of 18 U.S.C. 1512 committed by Defendant Blackwell. While the witness was testifying yesterday, we think it's inappropriate for the defendant [479] to be mouthing words to her, particularly when we're at side bars and she's waiting to testify again.

And, for example, saying the words, "I hate you," or looking at her in a mean face and saying, "I hate you," we

think is inappropriate. It tends to intimidate the witness. It tends to make the witness reluctant to testify. It tends to evoke emotion. It does anything but, we think, allow for fair administration of justice.

We think – any defendant, if there was a bank robbery case and they mouthed words to the witness on the stand, they'd be thrown in jail. We think that's inappropriate for Mr. Blackwell to be doing that in the course of the proceedings.

THE COURT: Now, I did not witness such behavior on the part of Mr. Blackwell, but it was reported to me. But again, I did not observe it.

I am going to say this to all of the participants in this case: It is entirely improper to attempt to intimidate a witness by facial expressions or any other manner or gesture while the witness is on the witness stand.

If this occurs again in this trial, I'm going to hear evidence about it, if I didn't observe it myself, and I'll issue an appropriate contempt order if it happens again.

[480] I'm not directing this against Mr. Blackwell; I am addressing this to all of the participants in this case.

All right, anything else?

MR. MAROUS: Your Honor, I would submit that the ploy seemed to be to do it while we were at side bar yesterday, as it was reported to me, so you would never see it.

THE COURT: If you have an issue about that, I bring it to my attention at the time.

MR. MAROUS: Well, I didn't know about it till the end of the day yesterday when it was brought to my attention.

THE COURT: If you want to pursue it further, I'll be happy to hear evidence about it and do whatever is necessary. So I'll let you consider whether you want to do that.

But for now, I would like to proceed with the cross-examination of this witness. If you want to – you want to invoke the Court's assistance in regard to this further, I'll be happy to schedule time outside of the normal trial time to hear more about it.

All right, Mr. Gorman?

* * *

[3425] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	
PLAINTIFF,	:	
VS.	:	CASE NO. CR 2-04-134
ROGER D. BLACKWELL, et al.,	:	
DEFENDANTS.	:	

PROCEEDINGS

BEFORE THE HONORABLE JAMES L. GRAHAM, UNITED STATES DISTRICT JUDGE, SITTING AT COLUMBUS, OHIO, ON JUNE 7, 2005.

VOLUME XV

* * *

[3043] MR. GORMAN: And the last chart, this is just – this is a compilation of the NASD data that we've heard testimony about, and this is the end product of his leakage natures, of kind of event happens and you can't imply insider trading necessarily from the single fact that this happens.

It's from his article. It's the end of his testimony. This is a compilation of data. We didn't touch on the data.

THE COURT: I'm not going to let him say that you can't imply insider trading from what happened. That's invading the province of the jury.

MR. GORMAN: All right.

THE COURT: What do you say about this exhibit, Mr. Marous?

MR. MAROUS: Well, again, I think it's suggesting to the jury that somehow, because of – other people were [3044] tipped, that there's somehow some nullification effort or justification effort.

THE COURT: How is it relevant that at least 14 of the 17 Worthington Food directors had ties to people who bought stock?

MR. GORMAN: It's relevant, Your Honor, because the government has asked the jury to imply from this little circle down here, the people that knew Roger Blackwell that bought stock, that somehow that means he insider traded.

The total picture is, all of these directors know people who traded. That doesn't necessarily mean that – the jury needs to understand that; otherwise, they're not getting the full picture. They don't understand what's happening. They could be misled.

If you just look at this picture, they could jump to a conclusion –

THE COURT: Maybe they should have prosecuted these other people, too. Just because they didn't prosecute everybody, I don't see how that's relevant.

MR. GORMAN: Professor Jarrell says this happens in every takeover. If it happens every time you have a takeover, then you shouldn't just jump to the conclusion from the trading pattern alone. You need other evidence. And that's what the jury needs to assess.

[3045] But if they don't see this in perspective, then they don't have the full picture, and they're being misled.

MR. RAZZANO: Your Honor –

THE COURT: No, I don't agree. I think you're just drawing an inference from the fact that these other people weren't prosecuted. I don't think that's – I don't think that's proper.

MR. GORMAN: We're not saying anything about them. They were –

THE COURT: It's not the proper subject of expert testimony.

MR. GORMAN: You cited yesterday in your Rule 29 opinion –

THE COURT: I'm not going to let you do that. This is not proper.

Well, you've got a few more things to cover.

* * *

[3516] THE COURT: All right, who will cross-examine?

MR. von SCHAUMBURG: I will, Your Honor. Could we have a Side Bar before we start?

THE COURT: Yes, step forward.

(Bench conference out of the hearing of the jury.)

THE COURT: All right, go ahead.

MR. von SCHAUMBURG: Your Honor, the first several questions I have are going to be directed to his

efforts to intimidate Tina Blackwell while she was on the stand. I believe it goes to both his bias, his credibility, and his character. But I wanted to give the defendants an opportunity to be heard on the issue before I raised it.

[3517] MR. GORMAN: Your Honor, I'm not aware of any such activities, and I understand they made allegations that certain faces were made. I have no knowledge of this.

And I believe that this is totally improper. This is just in the realm of speculation about what people did.

This is obviously a very emotional situation for Professor Blackwell and Miss Stephan. And to try to take what I didn't even see but – let me assume that some face was made. To try to take some gesture or face out of context –

THE COURT: I think there is a factual basis for the questions. It was reported to me that gestures, facial expressions, and mumbling of some words – and I think there was obviously a change in the positioning of the witness in the courtroom by his counsel after this was reported. So there is a factual basis, I believe, and you can ask him.

MR. von SCHAUMBURG: Thank you, Your Honor.

THE COURT: See what he says.

MR. GORMAN: Your Honor, I understand your ruling. For the record, I did not change Professor Blackwell's position in the courtroom. He moved himself about to see, because we have the stand there and you [3518] can't see.

THE COURT: I'm satisfied there is sufficient factual basis for asking the questions, so I'm going to let him ask about it. There should be a wide open cross-examination.

MR. TYACK: Just for the record, on behalf of Defendant Jack, I want to note a continuing objection to this entire line of proposed questions about Professor Blackwell.

MR. RAZZANO: Add my objection to it as well.

MR. WINTERS: You got them all?

THE COURT: If we're having more discussions, I should be a part of them.

MR. TYACK: I was putting on the record my objection, Your Honor.

THE COURT: Well, let's hear what was said.

(The reporter read back as requested.)

THE COURT: Go ahead, Mr. Winters.

MR. WINTERS: I just wanted to make sure he had all the other objections as well.

THE COURT: I'm sorry, I left prematurely.

MR. EDWARDS: Please note my objection also on behalf of Defendant Kevin Stacy.

MR. POWELL: Mine as well on behalf of Black Jack Enterprises.

[3519] MR. GORMAN: Your Honor, if I could note for the record, you gave the government an earlier opportunity to proffer this information into the record.

They refused. I think this is totally improper. I think this is just nothing but –

THE COURT: Anything that bears upon this witness's credibility is proper, and if he made improper gestures in the courtroom or tried to intimidate the witness, he can be asked about that.

I don't know what he's going to say, but I think there's a sufficient basis for the question. It was reported to me by numerous people in the courtroom that this is what happened, so. . . .

MR. von SCHAUMBURG: Thank you, Your Honor.

THE COURT: Go ahead.

(End of bench conference.)

CROSS-EXAMINATION

BY MR. von SCHAUMBURG:

Q. On Wednesday, May 18th, 2005, you tried to intimidate your ex-wife in this courtroom during her direct examination; isn't that right?

A. That's not right.

Q. I'm sorry, I didn't hear you.

A. No, I didn't try to intimidate her.

Q. And on Wednesday, May 18th, 2005, you tried to bully [3520] your ex-wife during her direct examination, didn't you?

A. No.

Q. You attempted to bully and intimidate your ex-wife in an effort to keep her from telling the truth against you during her testimony in this courtroom; isn't that right?

A. No, that's not right.

Q. You attempted to intimidate your ex-wife in this courtroom before this jury while we were at a Side Bar discussing issues of law; isn't that correct?

MR. GORMAN: Your Honor, I want to object. Mr. von Schaumburg is simply testifying.

THE COURT: Overruled, overruled.

THE WITNESS: No, I didn't.

BY MR. von SCHAUMBURG:

Q. During those side bars you mouthed the words "I hate you" to your ex-wife; yes or no?

A. No.

Q. So are you telling this jury that you did not mouth the words "I hate you" to your ex-wife during her direct examination on May 18th?

A. No, I did not.

Q. You glared at your ex-wife throughout her direct examination in this courtroom, correct?

A. It might be correct to say I glared at her at some [3521] times. That might be true.

Q. But you didn't mouth the words "I hate you"?

A. No, I did not.

MR. TYACK: Objection; asked and answered.

THE COURT: All right, sustained.

BY MR. von SCHAUMBURG:

Q. Now, are you aware that at least one person reported your activities to the Court?

MR. GORMAN: Objection, Your Honor.

THE COURT: Sustained.

BY MR. von SCHAUMBURG:

Q. So if one juror saw you mouth the words "I hate you" to your wife during her direct exam, they will know you're lying today, won't they?

MR. GORMAN: Objection.

MR. TYACK: Objection.

THE COURT: Sustained.

* * *

Columbus Monthly, December 2005

City Journal

UPDATE A Blackwell juror talks

[Picture Omitted]

One of the 12 jurors in the June trial of Roger Blackwell has decided to speak out, providing insight into the guilty verdict that could earn the disgraced former Ohio State University professor up to 10 years in federal prison, in addition to costing him millions in fines ("The insider goes down," August).

In an e-mail to *Columbus Monthly*, the juror, JoAnne Toftner of Delaware, wrote, "Mr. Blackwell lied under oath on the witness stand," adding, "I am still at a loss when I try to understand what the motivation was behind Mr. Blackwell's actions."

In a subsequent telephone interview, Toftner explained that three jury members saw Blackwell mouth "I hate you" to Tina Stephan, his ex-wife, while she was testifying. Blackwell later took the stand and denied doing so. When Toftner and other jury members began discussing Blackwell's denial during deliberation, "his fate was virtually sealed from my perspective," Toftner says.

Blackwell, a bestselling author and marketing guru who resigned from OSU after the trial, was found guilty in federal court of 19 counts of insider trading and related charges resulting from giving information to family and friends in 1999 about Kellogg's Corp.'s purchase of Worthington Foods Corp. Blackwell was a Worthington Foods board member at the time.

Blackwell's attorneys have filed a motion for a new trial. No ruling had been made by mid November. His sentencing is pending – as is a civil lawsuit brought by the Securities and Exchange Commission.

Regarding the criminal trial, Toftner says the jury found the testimony and evidence to be "pretty straightforward." They took two and a half days to reach their decision. "We wanted to make sure to examine everything," she says. "There were no heated arguments."

Toftner says she and other members of the jury found Jack Kahl's testimony compelling. Kahl, one of Blackwell's closest friends, said Blackwell had told him about the impending Kellogg's buyout, enabling him to make a profit of $168,000 in a matter of weeks on the Worthington Foods stock he purchased. Kahl, who was given immunity for his testimony, "seemed to be very sincere," Toftner says.

As for Blackwell, she says. "It just seems amazing that somebody so well educated and familiar with the workings of the world would do something like this."

▼ *Dennis Read*